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Supreme Court, U.S.
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In The

# Supreme Court of the United States

DWAYNE BISHOP,

*Petitioner,*

v.

BRUCE HUNTER,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does the Fifth Circuit's dismissal of Petitioner's appeal conflict with this Court's decisions that a denial of qualified immunity is immediately appealable to the extent it turns on an issue of law?

2. Does the Fifth Circuit's holding conflict with this Court's decisions setting forth the proper framework for analyzing a claim of qualified immunity by: (1) holding that genuine issues of material fact preclude a summary-judgment determination of Petitioner's qualified-immunity defense; and (2) failing to address the purely legal questions whether Respondent has pleaded a constitutional violation at all for each of his federal claims, and if so, to then determine whether Respondent has alleged at the appropriate level of specificity that the particular constitutional right(s) was clearly established?

## PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

Petitioner Dwayne Bishop is appellant in the court of appeals, and Respondent Bruce Hunter is appellee in the court of appeals.

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## CITATIONS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

The per curiam opinion of the court of appeals in No. 01-11397 is not reported. (App. 1-2.) The district court's order in Civil Action No. 3:00-CV-0933-P is not reported. (App. 3-22.)

## BASIS FOR JURISDICTION IN THIS COURT

The judgment of the court of appeals was entered on September 27, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment in question.

## CONSTITUTIONAL PROVISIONS, STATUTES, AND OTHER AUTHORITIES INVOLVED IN THE CASE

The following constitutional provisions, statutes, and other authorities are involved in the case:

(1) U.S. Const. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(2) U.S. Const. amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing

the place to be searched, and the persons or things to be seized.

(3) U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(4) 28 U.S.C. § 1291 (in pertinent part)

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

(5) 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of

Columbia shall be considered to be a statute of the District of Columbia.

(6) Tex. Code Crim. P. art. 14.01(b)

A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.

(7) Fed. R. Civ. P. 56(c) (in pertinent part)

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

## STATEMENT OF THE CASE

"Qualified immunity 'is an entitlement not to stand trial or face other burdens of litigation.' The privilege is 'an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). "Accordingly, the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable: in each case, the district court's decision is effectively unreviewable on appeal from a final judgment." *Mitchell*, 472 U.S. at 526-27.

It has been more than 17 years since this Court decided in *Mitchell* that immediate appeals, to the extent they turn on issues of law, may be taken from denials of qualified immunity. Although the Court has subsequently

restated and explicated that holding,[1] the court of appeals, in the instant case, has failed to follow the Court's decisions, which mandate consideration of the questions of law presented in Petitioner's appeal of the district court's denial of qualified immunity. The court of appeals instead dismissed the appeal, holding that it lacked jurisdiction because the district court had found that genuine issues of material fact prevented a determination of qualified immunity.

In its opinion, however, the court of appeals did not analyze or even address whether Respondent has pleaded the violation of a clearly established constitutional right, even though Petitioner raised and argued that issue in both the district court and the court of appeals, and even though this Court requires that to be the initial inquiry in a qualified-immunity analysis.[2] Such an inquiry would show that Respondent has failed to allege the violation of a clearly established constitutional right – that is, to allege a constitutional violation at the appropriate level of specificity in the context of the case – and the court of appeals' dismissal without considering the questions of law has deprived Petitioner of the very protection qualified immunity affords – the entitlement not to stand trial. This petition should therefore be granted.

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[1] *See, e.g., Behrens v. Pelletier*, 516 U.S. 299 (1996); *Johnson v. Jones*, 515 U.S. 304 (1995), discussed *infra*.

[2] *See, e.g., Saucier*; *Wilson v. Layne*, 526 U.S. 603 (1999); *Siegert v. Gilley*, 500 U.S. 226 (1991), discussed *infra*.

## A. Basis for Jurisdiction in the Courts Below

Respondent filed this action in the United States District Court for the Northern District of Texas under 42 U.S.C. § 1983, alleging that Petitioner and Darvin Hill,[3] City of Dallas police officers, violated Respondent's rights under the First and Fourth Amendments to the United States Constitution in connection with Respondent's arrest and prosecution for misdemeanor assault. The district court's jurisdiction is based on 28 U.S.C. §§ 1331, 1343(a)(4), and 1367(a). Jurisdiction in the United States Court of Appeals for the Fifth Circuit over Petitioner's interlocutory appeal is based on 28 U.S.C. § 1291. *See Behrens*; *Johnson*; *Mitchell*; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

## B. Course of Relevant Proceedings

Respondent filed his original complaint on May 2, 2000, alleging federal claims of unlawful detention, false arrest, excessive force, malicious prosecution, and violation of First Amendment rights in connection with his arrest by Petitioner on May 4, 1998, for misdemeanor assault, and his subsequent prosecution on that charge. (Record 1-8.)

Respondent filed his first amended complaint ("Complaint") on October 10, 2000, alleging the same federal claims as in the original complaint. (App. 23-33.)

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[3] Hill is a co-defendant in the district court action. The district court granted summary judgment in his favor on all claims against him. (App. 3-22.) He is not a party in the court of appeals or in this Court.

On November 15, 2000, Petitioner filed his motion for summary judgment and brief in support on the basis of, *inter alia*, the defense of qualified immunity. (Record 67-105.)

Respondent filed his response to the motion and brief in support on December 15, 2000. (Record 110-54.) Petitioner's reply to that response was filed on January 4, 2001. (Record 159-84.)

In an unpublished memorandum opinion and order entered September 28, 2001, the district court denied Petitioner's motion for summary judgment on the basis of qualified immunity. (App. 3-22.)

On October 26, 2001, Petitioner filed his notice of appeal of that denial to the United States Court of Appeals for the Fifth Circuit. (Record 201-02.)

The court of appeals, in an unpublished per curiam opinion filed on September 27, 2002, dismissed Petitioner's appeal, holding that it lacked jurisdiction to hear the appeal because the district court denied the motion for summary judgment based on the existence of genuine issues of material fact that had to be resolved before the issue of qualified immunity could be determined. (App. 1-2.)

### C. Statement of Material Facts

According to Petitioner's summary judgment evidence, on May 4, 1998, Petitioner and Hill were working in plain clothes as police officers for the City of Dallas, Texas. (App. 34-35, 38-39.) They were assigned to provide security at a speaking engagement at White Rock Lake Park by then-Speaker of the United States House of Representatives Newt Gingrich and Congressman Pete Sessions. (*Id.*) Two

officers of the United States Capitol Police and several uniformed Dallas police officers were also present to provide security. (*Id.*)

When Petitioner and Hill arrived at the park with the speakers and capitol police officers, Respondent and several others were holding signs and standing together fifteen to twenty feet from the speaker's podium. (*Id.*) While Hill remained with Gingrich near the podium, Petitioner approached the persons holding the signs. (*Id.*)

Petitioner identified himself as a Dallas police officer, and told them, for security reasons and in order to prevent any disruption of the speeches, not to move any closer to the podium during the speeches. (App. 35.) Respondent asked Petitioner for identification, so Petitioner showed Respondent his badge and gave Respondent his business card. (*Id.*) Respondent alleges in his Complaint that he told Petitioner that he wanted to be near the front of the gathering. (App. 27.) He further alleges – without factual support – that Petitioner had entered into an agreement with Gingrich and Sessions to keep anyone carrying a protest sign out of view of any photo opportunity with them and Petitioner was therefore trying to block the view of Respondent's sign. (App. 25, 28.)

During the speeches, Petitioner, believing that Respondent was attempting to move closer to Gingrich in disregard of Petitioner's instructions, stood beside Respondent and asked for his identification because Petitioner perceived Respondent's actions as a possible threat to the safety of Gingrich. (App. 36.) Petitioner subsequently grabbed Respondent's arm to stop what he perceived as Respondent's continued attempts to move closer to Gingrich. (*Id.*)

According to Petitioner, Respondent then struck Petitioner's arm and told Petitioner to let go of him. (*Id.*) Petitioner placed Respondent under arrest for assault and handcuffed him. (*Id.*) Respondent was taken to jail by uniformed Dallas police officers. (*Id.*)

According to Respondent, he was walking away after the speeches were over when Petitioner suddenly grabbed his arm and demanded identification. (App. 28.) Respondent states in his summary judgment affidavit (although he does not so allege in his Complaint) that he told Petitioner in a raised voice to let go of him and lightly touched Petitioner's hand. (App. 48-49.)

Respondent alleges in his Complaint that the assault charge was dismissed because Petitioner failed to appear in court on the day of trial, that the Dallas City Attorney refiled the charge at Petitioner's request, and that it was again dismissed because Petitioner again failed to appear for trial. (App. 28-29.)

## ARGUMENT SUPPORTING ALLOWANCE OF THE WRIT

### A. The Dismissal of Petitioner's Appeal Conflicts with this Court's Decisions that a Denial of Qualified Immunity Is Immediately Appealable to the Extent It Turns on an Issue of Law.

The court of appeals held that it lacked jurisdiction to hear Petitioner's appeal of the denial of his motion for summary judgment based on qualified immunity because the district court found that genuine issues of material fact had to be resolved before the issue of qualified immunity could be determined. (App. 2.) Since the appeal involves questions of law regarding qualified immunity, however, the dismissal for lack of jurisdiction conflicts

with this Court's decisions in *Behrens*; *Johnson*; and *Mitchell*, which hold that an order denying a dispositive motion based on qualified immunity, to the extent the denial turns on an issue of law, is immediately appealable under the *Cohen* collateral order doctrine.

In *Cohen*, this Court held that a small class of orders that finally determine claims of right separable from, and collateral to, the substantive claims in an action are immediately reviewable as "final decisions" under 28 U.S.C. § 1291. *Cohen*, 337 U.S. at 546. The Court subsequently held, in *Mitchell*, that an order denying a motion for dismissal or summary judgment on the basis of qualified immunity, to the extent it turns on an issue of law, falls within this collateral order doctrine and is an appealable "final decision" under 28 U.S.C. § 1291. *Mitchell*, 472 U.S. at 526-30.

The scope of the collateral order doctrine in connection with denials of qualified immunity was the focus in *Johnson*, where the Court held that a denial of qualified immunity based on the existence of a genuine issue of material fact – i.e., evidence sufficiency – as opposed to a denial based on a question of law, is not immediately appealable as a final decision under the collateral order doctrine. *Johnson*, 515 U.S. at 307, 313-20. And, less than a year after *Johnson*, the Court again addressed the distinction between immediately appealable denials of qualified immunity that turn on issues of law and nonappealable denials based on evidence-sufficiency questions. *See Behrens*.

In explaining why the denial of a motion for summary judgment based on qualified immunity, to the extent it turns on an issue of law, is immediately appealable, the Court acknowledged its earlier finding that qualified

immunity is "'an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal [immunity] question.'" *Behrens*, 516 U.S. at 306 (quoting *Mitchell*, 472 U.S. at 526).

In *Behrens*, the respondent argued that denial of the petitioner's motion for summary judgment was not appealable because the denial was based on remaining issues of material fact – a situation the Court in *Johnson* had held precluded an interlocutory appeal. *See Johnson*, 515 U.S. at 313-18. The *Behrens* Court responded to that argument by stating:

> That is a misreading of the case. Denial of summary judgment often includes a determination that there are controverted issues of material fact, see Fed. Rule Civ. Proc. 56, and *Johnson* surely does not mean that *every* such denial of summary judgment is nonappealable. *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case. . . .

*Behrens*, 516 U.S. at 312-313 (citations omitted). Thus, even where the district court states that its denial of qualified immunity is based on genuine issues of material fact, the court of appeals still has jurisdiction over an interlocutory appeal to the extent the denial actually turns on an issue of law. *See id.*

In the instant case, Petitioner asserted in his appellate brief below that:

[Petitioner]'s appeal is based on questions of law, namely:

> (1) whether [Petitioner]'s motion for summary judgment should be granted based on qualified immunity as to [Respondent]'s federal

> claims because: (a) [Respondent] has failed to sufficiently plead a constitutional violation against [Petitioner]; and (b) [Petitioner]'s actions were objectively reasonable in light of clearly established law and the information he possessed. . . .

(Br. Appellant at 2.) Petitioner then argued in detail why the court of appeals should reverse the denial of summary judgment on both grounds – that Respondent failed to allege the violation of a clearly established constitutional right and that Petitioner's actions were objectively reasonable in light of clearly established law and the information he possessed. (*See id.* at 13-51.)

Determining whether a plaintiff has alleged the violation of a constitutional right, and if so, whether that right was clearly established, is the initial inquiry in analyzing a claim of qualified immunity and is purely a question of law. *See Saucier*, 533 U.S. at 201; *Wilson*, 526 U.S. at 609; *Siegert*, 500 U.S. at 231-32. The court of appeals, however, failed to address *at all* whether Respondent's pleadings sufficiently allege the violation of a clearly established constitutional right, instead jumping ahead to a finding that genuine issues of material fact preclude a determination of qualified immunity. Consideration of that issue has nothing to do with the legal question regarding sufficiency of the pleadings.

Furthermore, Petitioner argued to the court of appeals that even though the district court identified five federal claims asserted by Respondent – unlawful detention, unlawful arrest, excessive force, malicious prosecution, and violation of First Amendment rights – and denied qualified immunity as to all of them, Petitioner is entitled to an interlocutory appeal that evaluates each claim

separately. After that evaluation, Petitioner is then entitled to dismissal of any claim(s) as to which the district court incorrectly denied summary judgment, notwithstanding that Petitioner might have to stand trial on claims where summary judgment is not proper. (*See* Br. Appellant at 5-6.) According to this Court, qualified immunity is a "right to immunity *from certain claims*, not from litigation in general; when immunity with respect to those claims has been finally denied, appeal must be available, and cannot be foreclosed by the mere addition of other claims to the suit." *Behrens*, 516 U.S. at 312.

In dismissing the appeal, the court of appeals has avoided its responsibility – and its obligation to Petitioner – by failing to conduct the rigorous analysis this Court has clearly and unequivocally held that public officials are entitled to when they assert the defense of qualified immunity in response to suits for money damages arising out of their discretionary actions. Indeed, the court of appeals failed to grant Petitioner even a cursory review of the questions of law posed by his defense of qualified immunity. This decision by the court of appeals regarding an important federal question conflicts with the decisions of this Court, and the petition should be granted.

### B. The Court of Appeals' Decision Deprives Petitioner of a Meaningful Review of His Asserted Entitlement, Under this Court's Decisions Regarding Qualified Immunity, Not to Stand Trial.

Public officials who act within the scope of their discretionary authority and in the course of their official responsibilities are entitled to the defense of qualified immunity, which shields them from suit as well as from

liability for civil damages, where their conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Wilson*, 526 U.S. at 609 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). *See also Malley v. Briggs*, 475 U.S. 355 (1986); *Pierson v. Ray*, 386 U.S. 547 (1967).

In *Siegert*, this Court "clarif[ied] the analytical structure under which a claim of qualified immunity should be addressed." 500 U.S. at 231. The Court held that the first inquiry in the examination of a defendant's claim of qualified immunity is whether the plaintiff has alleged the violation of a clearly established constitutional right. *Id.* In making a determination of whether a plaintiff has asserted a "clearly established" constitutional right, the trial court must first determine "whether the plaintiff has asserted a violation of a constitutional right at all." *Id.* at 232.

In *Wilson*, the Court made clear the analytical steps set out earlier in *Siegert*. According to *Wilson*, the trial court must first determine whether the plaintiff has alleged the violation of a constitutional right at all. If the court determines that such a violation has been alleged, the court must then determine whether the right was clearly established at the time of the alleged violation. *Wilson*, 526 U.S. at 609. The Court most recently iterated this procedure in *Saucier*:

> If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established.

533 U.S. at 201. As shown below, the allegations in Respondent's Complaint fail to meet the foregoing standards.

Respondent complains that his arrest on May 4, 1998, and subsequent prosecution for assault violated his First and Fourth Amendment rights. (App. 23-33.) The factual allegations contained in Respondent's Complaint, however, are general, conclusory, and vague, and lack detail as to what conduct of Petitioner allegedly violated Respondent's constitutional rights and what circumstances existed that made Petitioner's actions unconstitutional or unreasonable. (*Id.*) Respondent must allege facts that would show that no reasonable police officer could have misunderstood that Petitioner's actions violated clearly established federal law, and that those actions were objectively unreasonable in light of the information Petitioner possessed at the time. *See Saucier*, 533 U.S. at 201-02; *Wilson*, 526 U.S. at 615. Because Respondent has failed to allege such facts, Respondent's Complaint is insufficient to overcome the specificity requirement. (App. 23-33.)

Under this Court's relevant decisions, the court of appeals should have analyzed whether Respondent has pleaded, for each of his federal claims, a constitutional violation at all, and if so, to then determine whether he has alleged at the appropriate level of specificity that the particular constitutional right(s) was clearly established. *See Saucier*, 533 U.S. at 200-01; *Wilson*, 526 U.S. at 609; *Siegert*, 500 U.S. at 231-32. As shown below, such an analysis establishes that Respondent has failed to allege the violation of any clearly established constitutional right, and Petitioner is entitled to qualified immunity.

**1. Unlawful Detention and False Arrest.**

Respondent alleges that "without cause or justification, [Petitioner] grabbed the [Respondent]'s left wrist and, without cause or legal justification, demanded that the Plaintiff produce identification." (App. 28.) Respondent then alleges that as soon as he retrieved his wallet to obtain identification, he "was advised that he was under arrest by Hill and Bishop and he was handcuffed and taken to the Dallas County Jail[,]" where he was charged with assault. (App. 28.)

Respondent apparently complains that Petitioner unlawfully detained him when Petitioner took him by the arm and asked him for identification. (App. 30.) A police officer may make an investigatory stop and briefly detain a person for questioning if the officer has a reasonable suspicion based on objective facts that the person is or may be involved in criminal activity, even though probable cause to arrest may not exist. *See Brown v. Texas*, 443 U.S. 47, 51 (1979); *Terry v. Ohio*, 443 U.S. 1, 30 (1968). Thus, a police officer who stops and detains a person for investigatory purposes based on a reasonable suspicion does not violate the Constitution and cannot be held liable for his actions.

Respondent's allegations that Petitioner, without cause or justification, grabbed Respondent's left wrist and demanded that he produce identification are conclusions that are not supported by factual allegations. Respondent admits in his pleadings that "he intended to be near the front of the gathering because he wanted to hear Sessions' and Gingrich's statements" and that he "also hoped that his sign would be photographed as well as seen by all in attendance." (App. 27.) Respondent focuses his allegations on the First Amendment, while failing to address

Petitioner's duty, to be balanced with Respondent's First Amendment rights, to protect the speakers and prevent disruptions during their speeches.

Respondent has failed to adequately plead, under the circumstances, that Petitioner unlawfully detained him. Under a properly contoured allegation, the question here would be whether, under the factual allegations in Respondent's Complaint, the law was clearly established at the time of Respondent's arrest that a police officer, while providing security at a public speech given by an elected official, violates the Fourth Amendment by, under any circumstances, holding the arm of and asking identification from a person who is holding a protest sign during the speech and has insisted on standing at the front of the audience.

The district court found that Respondent had alleged that Petitioner unlawfully detained and arrested him without any legal cause or justification in violation of the Fourth Amendment, and had thus satisfied the first prong of the qualified-immunity analysis for those claims. (App. 13.) According to this Court, however, Respondent's allegation is not sufficient to state a clearly established violation of the Fourth Amendment. *See Saucier*, 533 U.S. at 200-01.

Respondent also contends that he was falsely arrested for assault. (App. 30.) Respondent alleges that he did not assault Petitioner or commit any other criminal offense. (App. 28-30.) He does not, however, allege that he did not strike Petitioner on the arm, nor does he allege that no reasonable basis existed for Petitioner to conclude that probable cause existed that Respondent had committed an assault. (App. 23-33.)

Texas law specifically provides that a police officer may arrest a person without a warrant for any offense committed in his presence or within his view. Tex. Code Crim. P. art. 14.01(b). An arrest made without a warrant is lawful if the "facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *McCray v. Illinois*, 386 U.S. 300, 304 (1967) (citations omitted). "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater v. City of Lago Vista*, 531 U.S. 990, 121 S.Ct. 1536, 1557 (2001).

A showing of probable cause requires far less evidence than that sufficient to support a conviction. *See United States v. Woolery*, 670 F.2d 513, 515 (5th Cir. 1982); *United States v. Ashcroft*, 607 F.2d 1167, 1170 (5th Cir. 1979). The Constitution does not guarantee that only the guilty will be arrested. *Baker v. McCollan*, 443 U.S. 137, 145 (1979). In determining probable cause, one must take into account the experience of the officer. Conduct innocent in the eyes of the untrained may carry entirely different messages to the experienced or trained observer. *See United States v. Walden*, 707 F.2d 129, 131 (5th Cir. 1983); *Woolery*, 670 F.2d at 515; *United States v. Clark*, 559 F.2d 420, 424 (5th Cir. 1977).

Probable cause to arrest is a determination made by the arresting officer acting within his discretion with the information known to him at the time. It is determined not from the viewpoint of the arrestee, but from an objective standard of what a reasonable police officer could have

concluded. *See Glenn v. City of Tyler*, 242 F.3d 307, 313 (5th Cir. 2001). Whether the officer's conduct is reasonable depends upon the circumstances as they appear to the officer at the time of the detention or arrest and due regard must be given to the fact that the officer is acting in the urgency of a street confrontation and not in the calm atmosphere of a courtroom. *Foster v. Zeeko*, 540 F.2d 1310, 1314 (7th Cir. 1976); *Whirl v. Kern*, 407 F.2d 781, 790-791 (5th Cir. 1968).

For qualified-immunity purposes, the question is not whether Respondent assaulted Petitioner. The proper inquiry is whether a reasonable officer could have believed that Petitioner was justified in his belief that Respondent had assaulted him, based on clearly established law and the information possessed by Petitioner, and viewed in the context of Petitioner's duty to provide security for the Speaker of the House of Representatives and a United States Congressman. Respondent has failed to allege facts to show that no reasonable officer could have so believed, and summary judgment based on qualified immunity is therefore proper.

**2. Excessive Force.**

Respondent alleges, in conclusory fashion, that Petitioner used excessive force against him and assaulted him. (App. 28-30.) To recover for a constitutional claim of excessive force in the Fifth Circuit, Respondent must plead and prove that he suffered (1) an injury (2) which resulted directly and only from the use of force that was clearly excessive to the need and (3) the force used was objectively unreasonable. *See Glenn*, 242 F.3d at 314 (citing *Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir. 2000); *Williams v. Bramer*, 180 F.3d 699, 703 (5th

Cir. 1999)). Under a properly contoured allegation, the question here would be whether, under the factual allegations in Respondent's Complaint, the law was clearly established at the time of Respondent's arrest that a police officer, while providing security at a public speech given by an elected official, uses objectively unreasonable excessive force in violation of the Fourth Amendment by holding the arm of a person who is holding a protest sign during the speech and has insisted on standing at the front of the audience, and from whom the officer is asking identification, or by handcuffing the person after arresting him for misdemeanor assault.

In this case, Respondent has failed to allege specific facts showing that he suffered an injury resulting directly and only from Petitioner's alleged use of excessive force. (App. 23-33.) Respondent's only allegations regarding *any* use of force or physical contact are: (1) as Respondent started to leave the park, Petitioner grabbed Respondent's left wrist; and (2) after being placed under arrest, Respondent was handcuffed. (App. 28.) However, Respondent does not allege the nature of an injury, its severity, or its duration. Respondent thus cannot meet the first prong necessary to establish a constitutional violation – that he suffered an injury.

Even if Respondent has properly alleged an injury (which Petitioner denies), Respondent has failed to allege or show that such injury resulted directly and only from the use of force that was clearly excessive to the need and was objectively unreasonable. (App. 23-33.) Respondent has thus failed to allege a constitutional violation for excessive force.

In *Saucier*, a case similar to the instant case, this Court addressed qualified immunity as to an excessive

force claim arising from the arrest of a demonstrator during a speech of the Vice President of the United States. *Saucier*, 533 U.S. at 207-09. In *Saucier*, the Court was confronted with an alleged use of force – the plaintiff being shoved into a military van by a military police officer – greater than the alleged force in this case. The Court held that the officer was entitled to qualified immunity, noting that "[w]e have approved the observation that '[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment.'" *Id.* at 209 (citations omitted). The Court went on to state:

> In the circumstances presented to this officer, which included the duty to protect the Vice President of the United States from persons unknown in number, neither respondent nor the Court of Appeals has identified any case demonstrating a clearly established rule prohibiting the officer from acting as he did, nor are we aware of any such rule. Our conclusion is confirmed by the uncontested fact that the force was not so excessive that respondent suffered hurt or injury. On these premises, petitioner was entitled to qualified immunity, and the suit should have been dismissed at an early stage in the proceedings.

*Id.* The same situation is present here.

In the instant case, the district court correctly stated that for an excessive force claim, an injury must be more than *de minimis*. (App. 16.) And although the district court repeats Respondent's allegation that Petitioner pushed Respondent, jabbed him in the chest, and forcibly handcuffed him, (App. 6), there again is no allegation or finding of an injury.

The district court noted that the Fifth Circuit has held, in *Glenn*, 242 F.3d at 314, that an allegation that handcuffing too tightly caused a person's wrist to swell does not, without more, amount to sufficient injury for a claim, but further noted that Respondent in this case has also alleged other improper touching of his person. (App. 17.) Regardless of any allegation of "improper touching," however, Respondent has not alleged an injury, not even swollen wrists, and has thus failed to state a claim for excessive force.

Finally, the district court stated that Respondent has alleged that the use of force amounted to malicious, willful, wanton, and reckless acts, evidencing a total disregard for Respondent's constitutional rights. (App. 17.) That allegation is conclusory and improperly injects subjective intent into the qualified-immunity analysis. *See Harlow*, 457 U.S. at 817-18.

With respect to a claim of excessive force, a standard of reasonableness at the moment applies. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain and rapidly evolving – about the amount of force that is necessary in a particular situation. *Graham v. Connor*, 490 U.S. 386, 396 (1989). The Court cautions against courts using the "20/20 vision of hindsight" in determining reasonableness. *Graham*, 490 U.S. at 396; *see also Saucier*, 533 U.S. at 205.

In this case, the circumstances under which Petitioner encountered Respondent precluded Petitioner from simply ignoring Respondent or leaving him be. Petitioner had a duty to protect the political speakers from any potential physical threat Respondent may have posed. Respondent

has not demonstrated how Petitioner's actions were objectively unreasonable under the circumstances known to Petitioner at the time.

**3. Malicious Prosecution.**

To state a constitutional malicious prosecution claim in the Fifth Circuit, Respondent must allege:

(1) a criminal action was commenced against him;
(2) the prosecution was caused by Petitioner or with Petitioner's aid;
(3) the action terminated in Respondent's favor;
(4) Respondent was innocent;
(5) Petitioner acted without probable cause;
(6) Petitioner acted with malice; and
(7) Respondent was damaged by the criminal proceeding.

*Kerr v. Lyford*, 171 F.3d 330, 340 (5th Cir. 1999). Under a properly contoured allegation, the question here would be whether, under the factual allegations in Respondent's Complaint, the law was clearly established at the time of Respondent's arrest that a police officer acts with malice and without probable cause by charging with misdemeanor assault a person under the circumstances known to the officer in this situation.

Respondent argues that Petitioner is liable for malicious prosecution because Petitioner did not appear in court as a witness when the case was set for trial, resulting in dismissal of the case, and because Petitioner "knew that the charges were false and baseless." (App. 28-29.) Respondent alleges that, after the case was dismissed, the charges were refiled at Petitioner's request, Petitioner again did not appear for trial, and the subsequent case

was also dismissed. (*Id.*) As discussed above, however, Respondent has not alleged facts to show that Petitioner arrested Respondent for assault without probable cause. Therefore, even if Respondent's allegations that the criminal cases were dismissed because Petitioner did not appear for trial are taken as true for purposes of summary judgment, Respondent has not alleged at least one essential element of his claim of malicious prosecution.

The district court found that it cannot decide the qualified-immunity issue on the malicious prosecution claim because the existence of probable cause is disputed. (App. 18.) It did not, however, identify which material facts are disputed. And, as with the other Fourth Amendment claims, Respondent has failed to allege a malicious prosecution claim at the appropriate level of specificity to overcome Petitioner's qualified immunity.

**4. Violation of First Amendment Rights.**

The district court cited *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), as holding that "[t]he right of an American citizen to criticize public officials and policies and to advocate peacefully is the central meaning of the First Amendment." (App. 19.) The district court then found that Respondent had stated a claim for a First Amendment violation.

The First Amendment violation alleged by Respondent and recited by the district court does not sufficiently define the contours of the right in the context of this case. Under a properly contoured allegation, the question would be whether the law was clearly established at the time of Respondent's arrest that a person attending a political speech in a public park had a First Amendment right to stand wherever he wanted while holding a protest sign or

to be able to stand in the same places that persons without signs were allowed. Under a second properly contoured allegation, the question would be whether the law was clearly established at the time that a police officer providing security at political speeches of high-ranking elected officials could not keep attendees (and protesters) a reasonable distance from the speakers.

Respondent's allegations that his First Amendment rights were violated are interspersed throughout Respondent's Complaint. (App. 23-33.) The gist of the First Amendment claim, however, appears to be that Petitioner told Respondent where he could stand, detained him, and arrested him solely because he carried a protest sign opposing the political viewpoints of the speakers. (*Id.*) In other words, Respondent attempts to allege that Petitioner engaged in content-based suppression of Respondent's free speech rights. In connection with this exercise of free speech, Respondent further alleges that Petitioner did not have the authority to restrict where he chose to stand or display his protest sign during the speeches. (App. 27-32.)

This Court has held that the First Amendment protects a speaker's autonomy to choose the content of his own message. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). In *Hurley*, the Court held that a parade organizer could, on First Amendment grounds, exclude would-be parade participants who wanted to exercise their own free speech rights while marching in the parade. This rule carries with it the right of a speaker to reject a message with which the speaker disagrees. *Id.* Respondent thus misstates the law when he asserts that he has the right, under the First Amendment, to stand anywhere he chooses

at a political speech while holding a protest sign. Under *Hurley*, even though Petitioner's action in keeping Respondent from approaching Gingrich was not content-based, Gingrich could have, independent of security concerns, required those carrying signs with a message contrary to his speech to remain in a location that would not disrupt his speech.

Indeed, the Sixth Circuit followed the reasoning in *Hurley* when it held that a municipality could lease its town commons to a private political organization for purposes of holding a rally in support of a particular presidential candidate, and that organization could exclude from the rally a person wearing a campaign button supporting the candidate's opponent. *Sistrunk v. City of Strongsville*, 99 F.3d 194 (6th Cir. 1996). The plaintiff in *Sistrunk* argued that the government cannot forbid access to a public forum for expressive purposes by converting it into nonpublic property or a nonpublic forum. The court disagreed, holding that the government can issue permits to groups seeking to make exclusive use of the public forum for expressive activity during a limited period of time and, following *Hurley*, those groups could exclude individuals expressing a message the group did not wish to convey. *Sistrunk*, 99 F.3d at 198.

Even in a public forum (such as a city park), the government may impose reasonable restrictions on the time, place, or manner of constitutionally-protected speech, provided they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. *See Ward v. Rock*

*Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Likewise, the government may reasonably regulate the place and manner of certain demonstrations. *Boos v. Barry*, 485 U.S. 312, 331 (1988). In applying that rule to a statute prohibiting certain congregations in front of foreign embassies, this Court held that the statute at issue was constitutional as narrowed to provide that congregations can be dispersed "'only when the police reasonably believe that a threat to the security or peace of the embassy is present.'" *Id.* at 330 (quoting the court of appeals' decision in the same case, *Finzer v. Barry*, 798 F.2d 1450, 1471 (D.C. Cir. 1986)). Similarly, a police officer who perceives a potential threat to the Speaker of the United States House of Representatives can lawfully restrain that individual from moving toward the Speaker.

In the context of police-ordered, rather than legislative, restrictions on time, place, and manner of speech, "[t]he privilege of a citizen of the United States to use the streets and parks for communication of views of national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in the subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied." *Potts v. City of Lafayette, Ind.*, 121 F.3d 1106, 1111 (7th Cir. 1997) (citation omitted). *Potts* involved a § 1983 case wherein the plaintiff was alleging a First Amendment free speech violation and Fourth Amendment false arrest for his arrest arising out of his attempt to enter a Ku Klux Klan rally held on public property while he was carrying a portable tape recorder, after being told by a police officer that he could not enter with the tape recorder. The court in *Potts* upheld the police restrictions as reasonable for the

protection of the speakers and those in attendance and to prevent disruption of the rally.

In *Grider v. Abramson*, 180 F.3d 739 (6th Cir. 1999), the court, in holding that police-ordered restrictions regarding a Ku Klux Klan rally were valid, stated that

> peace officers, in discharge of their professional obligation to execute the police powers of local government, as well as the obligations imposed by 42 U.S.C. § 1983 upon agents of the states and their local instrumentalities to avoid impositions upon individual exercises of constitutional freedoms, must take the actions necessary to protect the physical safety of citizens, the exercise of the speech and assembly rights of rally organizers, and the overall public order.

*Id.* at 747-48 (footnote omitted). According to the court, "the constitutionality of a law enforcement measure . . . taken in furtherance of a criminal justice enforcement agency's inherent public safety responsibilities, must be evaluated relative to the actual impact that measure had upon a particular plaintiff." *Id.* at 748. Speakers at an event possess a protected interest in addressing their audience under orderly and audible conditions, and have a right to be free from interruption by outside elements. *Id.* at 751. Police officers have a duty to prevent a "heckler's veto" during the exercise of protected speech under protected circumstances. *See Glasson v. City of Louisville*, 518 F.2d 899, 906 (6th Cir. 1975).

In connection with the foregoing cases, it is important to note what Respondent has *not* alleged. Respondent has not alleged that he was prevented or prohibited from attending the speeches, or from displaying his sign to anyone who wanted to see it, including the speakers, members of the media, and other persons present at the

speeches. And although Respondent alleges that Petitioner stood in front of Respondent's sign to obstruct the speakers' view of it, (App. 28), nothing in Respondent's Complaint reflects that Respondent could not have taken some action, other than moving closer to the speakers, to make his sign visible.

With regard to Respondent's allegation that Petitioner attempted to obstruct the speakers' view of Respondent's sign based on the sign's content, it is important to note that there is no allegation that Petitioner, or anyone else for that matter, attempted to obstruct the speakers' view of the other signs being displayed.

As shown by the case law discussed above, Petitioner had the legal authority to prevent Respondent, by physical restraint if necessary, from approaching Gingrich in a manner that could be perceived by Petitioner as potentially threatening to the safety of Gingrich or that could disrupt Gingrich's speech. Respondent must therefore plead facts to overcome Petitioner's authority to so act. In *Saucier*, discussed above, a similar fact situation existed. While this Court noted that *Saucier* was presented on the assumption that no First Amendment violation occurred or lack of probable cause existed, and it was only addressing an excessive force claim, *see Saucier*, 533 U.S. at 207, the Court held that no clearly established law existed to prohibit the officer from acting as he did in furtherance of his duties to protect the Vice President, and the officer was thus entitled to qualified immunity. The same is true in the instant case.

By Respondent's own admission, he was not prevented by Petitioner from attending the speeches or from holding his protest sign, and he stood close enough to the speakers to hear them and for his sign to be seen. (App. 24-28.)

Those are the only "First Amendment" rights Respondent alleges to have intended to exercise. (*Id.*) Because he did in fact exercise those rights, Respondent cannot complain that he was prevented from doing so. He has thus failed to allege the violation of a clearly established First Amendment right.

When Petitioner first spoke with Respondent, Respondent told him that "he intended to be near the front of the gathering." (App. 27.) Thus it was objectively reasonable for Petitioner, who was providing security for the speakers, to view Respondent more closely than others present. Respondent admits that Petitioner "indicated that he [Petitioner] did not want the [Respondent] to be located where he was," and that Petitioner told Respondent "to maintain a distance from the speakers." (App. 27.)

The district court's findings fail to address the clearly established law with sufficient specificity. The district court relied on Respondent's allegations "that he was denied photo opportunities because he carried a sign indicating disagreement with Congressman Sessions and/or Speaker Gingrich," and his allegations that "he was detained and arrested by [Petitioner] for exercising his freedom of speech rights. . . . " in finding that Respondent "has stated a claim for a constitutional violation based on First Amendment grounds." (App. 19.)

The district court then stated that it must deny qualified immunity on the First Amendment claim because "a genuine dispute as to the material and operative facts of this case exist with relation to [Respondent]'s claims. . . . Summary judgment is inappropriate under these circumstances, *unless Plaintiff's version of the violation does not implicate clearly established law*." (App. 20 (emphasis added).) The court did not, however, identify

"the material and operative facts" it referred to or explain what it meant by the last part of its finding.

**5. Summary.**

The court of appeals has failed to comply with this Court's requirements, contained in *Saucier*, *Wilson*, and *Siegert*, that it determine whether Respondent has alleged the violation of a clearly established constitutional right. (App. 1-2.) Likewise, the district court, in its order denying Petitioner's motion for summary judgment, did not properly analyze whether Respondent adequately pleaded the violation of a clearly established constitutional right. (App. 3-22.) As Petitioner has shown, such an analysis would have established that Respondent has failed to sufficiently plead a clearly established constitutional violation against Petitioner for unlawful detention, false arrest, excessive force, malicious prosecution, or violation of First Amendment rights. Granting the petition is therefore proper.

## CONCLUSION

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS**
**For the Fifth Circuit**

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No. 01-11397

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BRUCE HUNTER,

Plaintiff-Appellee,

VERSUS

DWAYNE BISHOP; ET AL,

Defendants,

DWAYNE BISHOP,

Defendant-Appellant.

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Appeal from the United States District Court
for the Northern District of Texas
(00-CV-933)

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(Filed Sep. 27, 2002)

Before DeMOSS, STEWART, and DENNIS, Circuit Judges.

PER CURIAM:*

Defendant Dwayne Bishop, a Dallas city police officer, appeals the district court's denial of his motion for

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

summary judgment on qualified immunity grounds of Plaintiff Bruce Hunter's suit alleging violations of 42 U.S.C. § 1983. Hunter's suit alleges that Bishop unlawfully detained him; arrested him for assault without probable cause; used excessive force during the arrest; maliciously prosecuted him; and otherwise violated his 1st and 4th Amendment rights under the U.S. Constitution. Hunter also brings Texas state law claims alleging assault, battery, false arrest and false imprisonment.

We lack jurisdiction to hear an appeal of a denial of summary judgment on qualified immunity grounds, where the issue is "nothing more than whether the evidence could support a finding that particular conduct occurred. . . . " Behrens v. Pelletier, 516 U.S. 299, 313 (1996). Here, the district court denied Defendant's motion for summary judgment on grounds that genuine issues of material fact exist as to what occurred between Defendant and Plaintiff which must be resolved before the court could determine whether Defendant is immune from suit. Because this determination was merely one of "evidentiary sufficiency," we lack jurisdiction to hear Defendant's appeal.

Defendant's appeal is DISMISSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

| | | |
|---|---|---|
| BRUCE HUNTER<br><br>Plaintiff,<br><br>v.<br><br>DWAYNE BISHOP and DARVIN HILL,<br><br>Defendants. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | CIVIL ACTION NO.<br>3:00-CV-0933-P |

**MEMORANDUM OPINION AND ORDER**

(Filed Sep. 28, 2001)

Now before the Court for consideration is Defendants' Dwayne Bishop and Darvin Hill's Motion for Summary Judgment, filed November 15, 2000. Plaintiff filed his Response to Defendants' [sic] Motion for Summary Judgment on December 15, 2000. Defendants filed a Reply on January 4, 2001. After a thorough review of the summary judgment evidence, the pleadings, the parties' briefs, and the applicable law, for the reasons set forth below, the Court is of the opinion that Defendant's Motion for Summary Judgment should be GRANTED in part and DENIED in part.

**BACKGROUND**

This case arose out of the circumstances surrounding plaintiff (Howard) Bruce Hunter's arrest on May 4, 1998. According to facts alleged by Plaintiff, on May 4, 1998 Congressman Pete Sessions and (then) Speaker of the House Newt Gingrich were scheduled to appear at a "media event" taking place at White Rock Lake Park in

Dallas, TX in order to speak on environmental matters. Pl.'s First Am. Compl. at 2; Hunter Aff. at 2. Around mid-morning that day, Plaintiff, who was a member and officer of the Dallas Sierra Club, met with other Sierra Club officers at the home of Dr. John and Margie Haley, and all decided to attend the event. Hunter Aff. at 2. Some in the group elected to carry pasteboard signs with hand written messages on them. Plaintiff carried a cardboard sign in his hands that covered his entire chest area and which read "Pete Sessions – Don't use the environment to look Green." Pl.'s First Am. Compl. at 4.

Defendants Dwayne Bishop and Darvin Hill are veteran Officers with the Dallas Police Department who on May 4, 1998 were working in plain clothes, assigned to provide security for Speaker Gingrich and Congressman Sessions at this speaking engagement. *See* Bishop Aff. at 1. Plaintiff alleges that Defendants, somehow aware of a desire by Sessions and/or Gingrich to keep persons with adverse signs away from them, and acting under the pretext of security, agreed to keep any persons (such as himself) carrying any adverse signs, out of the view of any photo opportunity with the politicians. Pl.'s First Am. Compl. at 3. In addition, Plaintiff alleges that because he was carrying this sign, and on that basis alone, Defendants Bishop and Hill falsely concluded that he posed a physical threat to either Sessions or Gingrich, and caused his detainment and arrest without just cause or legal justification. Id. at 4-6.

The parties are in disagreement as to virtually every aspect of their interactions. According to Plaintiff, a podium had been erected and a rope barrier was constructed to separate the public from the speakers' podium. Id. at 4. Plaintiff then positioned himself on the opposite

side of the rope barrier, approximately fifteen to twenty feet from the podium. Id. at 5. Detective Bishop, positioning himself next to Plaintiff, informed Plaintiff that he was a Dallas police officer and that he did not want Plaintiff located where he was. Id.[1] Plaintiff alleges he told Bishop he intended to be near the front of the gathering because he wanted to hear Sessions' and Gingrich's statements. Id.

According to Mr. Hunter, Bishop again told him to maintain some distance from the speakers, although no similar statements were made to individuals who did not carry or display signs. Id. at 6. Bishop then positioned himself in front of Hunter in order to obstruct the view of Plaintiff's sign for those using the speakers' podium. Id; *see also* Hunter Aff. at 6.

After the event concluded, Plaintiff claims he started making his way toward the park's exit when at that point Bishop, who has walking alongside him, suddenly and forcibly grabbed Plaintiff's left wrist and demanded identification. Pl.'s First Am. Compl. at 6. Plaintiff claims that while still holding his sign, he calmly asked that

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[1] The [sic] is some additional discrepancies between the parties as to the facts here since Plaintiff, in his affidavit, alleges that "at [no] point did Det. Bishop or anyone else tell me, ask me or suggest to me that there was some designated area of the Park I should go to or be confined to during this event," Hunter Aff. at 5-6. Meanwhile, Defendant Bishop asserts that when he arrived at the Park "the sergeant came over and said there were some protestors . . . in the park, and they had told them a place that they could – an area where they could protest, and – but there was one guy [presumably Plaintiff] there that was – that was going against – more or less thought he could – he should not be in a certain area, he shouldn't have to stand in that certain area." Bishop Dep. at 15.

Bishop let go of his hand so that he could reach for his wallet in his back pocket, a request he says Bishop refused. Hunter Aff. at 7. At this point, allegedly out of fear that "other police officers might join in and [he] might be clubbed to the ground at any moment or even shot," he decided to "attract the attention of others." Id. at 7-8. This he did by "urging [Bishop] in a raised voice to let go of [him]" and by raising his right hand, and "very slowly lower[ing] it in a prolonged arc motion until it barely touched [Bishop's] clenched hand ... by no stretch of imagination a 'blow' ... [since] had a mosquito fallen asleep on Det. Bishop's clenched hand beneath [his] slowly descending hand, this insect might have been shaken up but certainly not killed or injured by [these] carefully controlled, highly theatrical gestures." Id. at 8. Plaintiff denies that he committed any offense, including any assault on Bishop. Pl.'s First Am. Compl. at 6. Instead, Hunter claims that Bishop pushed him, jabbed him in the chest, and forcibly handcuffed him, before placing him under arrest. Id. at 8-9.

Plaintiff further alleges that following his arrest, he was incarcerated for five and one-half hours, and subsequently had to appear in Dallas Municipal Court on two separate occasions to answer to the charge of "assault." Pl.'s First Am. Compl. at 9; Hunter Aff. at 11.[2] Plaintiff claims that the charges were dismissed at his first appearance, but Defendants Bishop and Hill re-filed the

[2] Plaintiff's Complaint and Affidavit are not in accord as to the dates of his appearances in Dallas Municipal Court, although he claims that both prosecutions "ended in his favor" because the charges were ultimately dismissed. Pl.'s First Am. Compl. at 9.

charges, only to have them once again be dismissed after Defendants failed to show in Court. *See* Hunter Aff. at 12. Plaintiff insists this re-filing can only be explained by Defendants motive in trying to cover up their illegal actions in arresting him for his insistence on the right to peaceably attend a public event and right to carry a protest sign. Id.

Defendants Bishop and Hill, on their behalf, claim they never participated in any agreement to prevent or obstruct any individuals with views different from those of Mr. Gingrich, from expressing their views or holding protest signs. Bishop Aff. at 2; Hill Aff. at 2. In fact, Bishop asserts that when he arrived at White Rick [sic] Lake Park, prior to the speeches, he approached Plaintiff and several women who were holding signs and standing together some fifteen to twenty feet away from the speaker's podium, and asked them not to move any closer to the podium during the speeches for reasons of security and in order to prevent any disruption of the speeches. Bishop Aff. at 1.

During Gingrich's speech, however, Bishop asserts that Plaintiff began moving closer, prompting him to go over and instruct Plaintiff not to do so. Id. at 2. Bishop here also refutes Hunter's contention that Plaintiff ever articulated an inability to hear or see the speech as his reason for moving closer. Id. Because Plaintiff insisted on moving closer, and because he was responsible for security at the event, Bishop claims to have perceived Plaintiff's actions as a possible threat to the safety of Mr. Gingrich. Id. Thereafter, seeing Plaintiff again move closer toward

Mr. Gingrich, Bishop decided to ask Plaintiff for his identification, a request he claims Plaintiff refused. Id.[3] At that point Detective Bishop claims he grabbed Plaintiff's arm in order to stop him from moving any closer, and immediately afterwards Plaintiff struck him on his arm several times as he yelled to let go of him. Id. Bishop then placed Hunter under arrest for assault, handcuffed him, and led him away with the assistance of uniformed Dallas Police Officers present at the scene. Id.

Meanwhile, Detective Hill claims he was moving with Mr. Gingrich toward the van in which they would leave the park when this incident occurred and he himself did not participate in Plaintiff's arrest. Hill Aff. at 1-2. However, Hill claims that he did witness Plaintiff's striking of Detective Bishop on the arm several times and afterwards prepared an offense report in relation to this incident. Id. at 2.

Finally, Defendants defend as the reason for not appearing for Plaintiff's court dates the fact that they were never notified by subpoena. *See* Bishop Dep. at 68-69.

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[3] It should be noted here that Defendant Bishop's testimony conflicts as to exactly when and where he decided to approach and later arrest Plaintiff, and as to where Speaker Gingrich was located at the time these actions took place. *See* Bishop Dep. at 57-58, 77 (Arrest made while Speaker Gingrich was still making his speech); *but see* App. Pl.'s Resp. Def.'s Mot. Summ. J., Ex. 2 (Arrest made *after* the speech had concluded, according to Dallas Police Department Arrest Report signed by Detective Bishop).

## DISCUSSION

### I. The Parties Claims

Plaintiff Hunter in this action asserts a right to recovery and declaratory judgment against Dallas Police Officers Dwayne Bishop and Darvin Hill based on their violation of 42 U.S.C. § 1983. More specifically, Plaintiff alleges that Defendants unlawfully detained him, arrested him for assault without probable cause, used excessive force during the arrest, maliciously prosecuted him, and otherwise violated his First and Fourth Amendment rights under the United States Constitution. Pl.'s First Am. Compl. at 8-9. In addition, Plaintiff alleges causes of action for assault, battery, false arrest and false imprisonment under Texas state law. Id. at 10. Defendants have moved this Court for relief claiming that summary judgment is proper because (1) probable cause or reasonable suspicion existed for Plaintiff's detention; (2) probable cause existed for Plaintiff's arrest; (3) the force used against Plaintiff did not rise to the level of a constitutional violation; (4) Defendants' [sic] did not maliciously prosecute Plaintiff; (5) Defendants did not violate Plaintiff's First Amendment rights; (6) Defendants are shielded from liability by the doctrine of qualified immunity with respect to Plaintiff's federal claims; (7) Defendants are not liable on Plaintiff's state law claims; and (8) Plaintiff is not entitled to a declaratory judgment as to his First Amendment rights. Def.'s Mot. Summ. J. at 2. Each of these arguments will be considered in turn.

### II. Standard for Summary Judgment

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories and

admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is appropriate in *any* case where the critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1076 (5th Cir. 1994). However, all evidence and the reasonable inferences to be drawn therefrom must be viewed in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The moving party bears the burden of informing the district court of the basis for its belief that there is an absence of a genuine issue for trial, and of identifying those portions of the record that demonstrate such an absence. *Celotex*, 477 U.S. at 323. Once the moving party has made an initial showing, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The mere existence of some factual dispute will not defeat a motion for summary judgment. *Willis v. Roche Biomedical Lab., Inc.*, 61 F.3d 313, 315 (5th Cir. 1995). Only disputes over facts that might affect the outcome of the suit under the governing law will preclude summary judgment. *Id.* Moreover, a dispute about a material fact is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*

The Court will not, in the absence of any proof, assume that the nonmoving party could or would prove the

necessary facts. *Little*, 37 F.3d at 1075. Therefore, if the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case, and on which he bears the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U .S. at 322-23.

## III. Qualified Immunity

"Qualified" or "good faith" immunity shields government officials performing discretionary functions from liability "unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). This shield of qualified immunity is generally available to government officials, such as Officers Bishop and Hill here, sued under 42 U.S.C. § 1983. *See Goodson v. City of Corpus Christi*, 202 F.3d 730, 736 (5th Cir. 2000).

In *Seigert* [sic] *v. Gilley*, 500 U.S. 226 (1991), the United States Supreme Court set forth the analytical framework for determining whether a plaintiff's allegations are sufficient to overcome a defendant's defense of qualified immunity. As a threshold matter, the Court must first determine whether the plaintiff has alleged a violation of a clearly established constitutional right. *Seigert* [sic], 500 U.S. at 231-232. If the plaintiff is successful, the Court must then determine whether the defendants conduct was objectively reasonable in light of the "clearly established" law at the time of the alleged violation. *Spann v. Rainey*, 987 F.2d 1110, 1114 (5th Cir. 1993); *see also Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

"Objective reasonableness" is a matter of law for the court to decide. *Goodson*, 202 F.3d at 736. The touchstone of this inquiry is whether a reasonable person would have believed that his conduct conformed to the constitutional standard in light of the information available to him and the clearly established law. *Id.* Therefore, "even law enforcement officials who 'reasonably but mistakenly commit a constitutional violation' are entitled to immunity." *Id.; see also Anderson*, 483 U.S. at 641.

**a. Claims of False Detention and Wrongful Arrest**

Individuals have a federally protected right to be free from unlawful arrest and detention resulting in a significant restraint of liberty, and violation of this right can be grounds for a suit under § 1983. *See Dennis v. Warren*, 779 F.2d 245, 247 (5th Cir. 1985). The Fourth Amendment, of course, applies to all seizures of the person, including seizures that involve only a brief stop short of traditional arrest. *See Terry v. Ohio*, 392 U.S. 1, 16-19 (1968). The constitutional standard for justifying such a particular intrusion demands that a police officer must be able to point to "specific and articulable facts" which, taken together with rational inferences from those facts, reasonably warrant that intrusion. *Id.* at 21.

Similarly, the Fourth Amendment requires that an arrest be supported by either a properly issued arrest warrant or probable cause. *Glenn v. City of Tyler*, 242 F.3d 307, 313 (5th Cir. 2001). Probable cause exists "when the totality of the facts and circumstances within a police officer's knowledge at the moment of an arrest are sufficient for a reasonable person to conclude that the suspect

had committed or was committing an offense." *Spiller v. City of Texas City Police Dept.*, 130 F.3d 162, 165 (5th Cir. 1997). Under Texas law, a police officer may arrest an offender, without a warrant, for any offense committed in his presence or within his view. *See* Tex. Crim. Pro. Code Ann. Art. 14.01 (Vernon 2001). A person commits the offense of assault if the person "intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative." Tex. Penal Code § 22.01(3) (Vernon 2001).

In this case, Plaintiff alleges that Officers Bishop and Hill unlawfully detained and arrested him on May 4, 1998, without any legal cause or justification in violation of his Fourth Amendment rights. *See* Pl.'s First Am. Compl. at 6-8. Since an illegal seizure as well as a wrongful arrest constitute violations of clearly established constitutional rights, Plaintiff's allegations satisfy the first prong of the qualified immunity analysis for each of these claims.

If the plaintiff asserts a violation of constitutional rights, the second step of this analysis requires the Court to determine whether the officials conduct was *objectively* reasonable under the clearly established law as it existed at the time of the incident. *See Bazan v. Hidalgo County*, 246 F.3d 481, 490 (5th Cir. 2001). The Fifth Circuit's precedents are clear in pointing out that the question of "objective reasonableness" is a matter of law for the district courts to decide. *See Goodson*, 202 F.3d at 736; *see also Lambkin* [sic] *v. City of Nacogdoches*, 7 F.3d 430, (5th Cir. 1993). However, a summary judgment denial of qualified immunity is still appropriate if there are "underlying historical facts in dispute that are material to the resolution of the question of whether the defendants acted

in an objectively reasonable manner." *Mangieri v. Clifton*, 29 F.3d 1013, 1016 (5th Cir. 1994). In this case, since so many discrepancies exist between the parties [sic] accounts of Plaintiff's actions leading up to and including his detainment and arrest, the Court finds that as a matter of law, a genuine dispute of material fact exists as to whether reasonable suspicion for the stop or probable cause for this arrest existed at the time. Such differing versions of these events "leave the Court without a coherent view of what actually happened in the first place." *Id.* Therefore, the Court cannot draw such the [sic] necessary conclusions of law from these disputed facts at the present summary judgment phase. *See Goodson*, 202 F.3d at 739. Thus, the Court denies Defendant Bishop's request for qualified immunity as to these claims.[4]

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[4] Defendants also allege that Bishop had additional justification to detain Plaintiff based [sic] his violation on [sic] § 38.15 of the Texas Penal Code. *See* Br. Def.'s Mot. Summ. J. at 4. This section provides, in pertinent part:

> (a) A person commits [the] offense [of Interference with Public Duties] if the person with criminal negligence interrupts, disrupts, impedes, or otherwise interferes with:
>
> > (1) a peace officer while the peace officer is performing a duty or exercising authority imposed or granted by law.

Tex. Penal Code Ann. § 38.15 (Vernon 2001).

The Fifth Circuit has held that a court may find a police officer is entitled to qualified immunity whenever a reasonable officer in his position could have found plaintiff's conduct warranted belief he committed the offense with which he was charged or a related offense, even if the second offense was not charged. *See Gasser* [sic] *v. City of Garland, Texas*, 864 F.2d 394, 399-400 (5th Cir. 1989). However, as noted above, Plaintiff here denies ever receiving or disobeying any order with regards to staying away from the speakers or interfering

(Continued on following page)

As for Detective Hill, nowhere does the summary judgment record indicate that Hill ever instructed or assisted Bishop in the detainment or arrest of Plaintiff in any manner. Additionally, Hill's affidavit indicates that he was moving with Mr. Gingrich toward the van in which they would all leave the park when this incident occurred, and there is no evidence here suggesting he participated in either Plaintiff's detention or arrest besides in writing a report. Hill Aff. at 1-2. Thus, Hunter fails to allege sufficient involvement by Defendant Hill to lay a foundation for recovery under § 1983 for these constitutional infringements, and qualified immunity will be granted to him as to these claims. *See Johnston v. City of Houston*, 14 F.3d 1056, 1060-1061 (5th Cir. 1994) (dismissing claims by plaintiff demonstrator who asserted claims of illegal detention and false arrest against police officer who did not participate in the plaintiff's detention or arrest).

### b. Claims of Excessive Force

The Fourth Amendment also governs claims of excessive force used during an arrest. *See Graham v. Conner* [sic], 490 U.S. 386, 394 (1989). In order to state a claim for excessive force in violation of the constitution, a plaintiff must allege "(1) an injury,[5] which (2) resulted directly and

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with Defendant's protection duty. *See* Pl.'s First Am. Compl. at 6. Therefore, a genuine and material dispute exists as to these facts, therefore also requiring denial of summary judgment on this point.

[5] At one time the Fifth Circuit required a plaintiff to establish a "serious injury" in order to prevail in an excessive use of force action. *See Johnson v. Morel*, 876 F.2d 477 (5th Cir. 1989) (en banc). However such proof is no longer necessary since the Supreme Court invalidated that requirement in *Hudson v. McMillan* [sic], 503 U.S. 1, 4 (1992).

(Continued on following page)

only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable." *Spann*, 987 F.2d at 1115. The amount of injury necessary to satisfy the Fifth Circuit's requirement of "some injury" and establish a constitutional violation is directly related to the amount of force that is constitutionally permissible under the circumstances. *Ikerd v. Blair*, 101 F.3d 430, 434-435 (5th Cir. 1996). Therefore, the injury must be more than a de minimis injury, evaluated in the context in which the force was deployed. *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2001).

Hunter here alleges that he was assaulted by Officer Bishop when his left wrist was grabbed without legal justification, and that Bishop grabbed his left upper arm and forcibly pushed up on it in a rude and provocative manner as he was being arrested. *See* Pl.'s First Am. Compl. at 6; *see also* Hunter Aff. at 8. According to Hunter, Bishop also jabbed him in the chest with the extended forefinger of his right hand, and forcibly handcuffed him before taking him downtown to County Jail. Id. at 9. Bishop strenuously denies these allegations, and asserts that he only used force that was reasonably necessary in order to prevent Plaintiff from continuing to approach Mr. Gingrich, and to place Plaintiff under arrest for assault. Bishop Aff. at 2. In *Glenn v. City of Tyler*, 242 F.3d at 314, the Fifth Circuit held that plaintiff's contentions that a police officer put her handcuffs on too tightly causing her right wrist to swell, without more, did not amount to

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Today, the proper amount of injury required to prevail in such an action depends on the context in which the injury occurs. *Ikerd v. Blair*, 101 F.3d 430, 434 (5th Cir. 1996).

sufficient injury for a claim of excessive force. However, unlike the plaintiff in *Glenn*, Hunter here claims that Detective Bishop did in fact improperly touch his person outside of when he was handcuffed, including being grabbed by the arm when he was first detained. Moreover, Hunter alleges that these actions amounted to malicious, willful, wanton, and reckless acts, evidencing a total disregard for Plaintiff's constitutional rights. *See* Pl.'s First Am. Compl. at 10. Therefore, at this summary judgment juncture, the Court must deny qualified immunity protection as to Defendant Bishop on these claims. However, Plaintiff once again has failed to allege sufficient involvement by Defendant Hill to lay a similar foundation for recovery under § 1983 here, and thus qualified immunity will be granted to Hill on the claim of excessive force. *See Johnston v. City of Houston*, 14 F.3d at 1060-1061.

**c. Claims of Malicious Prosecution**

The constitutional right to be free from a bad faith or malicious prosecution is sufficient to support a damage judgment against state law enforcement officials under § 1983. *Goodson*, 202 F.3d at 740. The elements necessary in order to establish a claim for malicious prosecution are that:

(1) the state commences a criminal prosecution against the plaintiff;

(2) the defendants caused or aided in the prosecution;

(3) the prosecution terminated in the plaintiff's favor;

(4) the plaintiff was innocent;

(5) the defendants acted without probable cause;

(6) the defendants acted with malice; and

(7) the criminal proceeding damaged the plaintiff.

*See Kerr v. Lyford*, 171 F.3d 330, 340 (5th Cir. 1999). For purposes of this claim, probable cause means "the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." *Id.*

Hunter here alleges in his complaint that following his arrest, he was incarcerated for five and one-half hours, and subsequently had to appear in Dallas Municipal Court on two separate occasions to answer to the charge of "assault" brought by the Defendants. Pl.'s First Am. Compl. at 9; Hunter Aff. at 11. In addition, he also claims these charges were dismissed twice after Defendants failed to show up to Court. *See* Hunter Aff. at 12; *see also* Footnote 2 *supra*. Defendants, however, defend as the reason for not appearing for Plaintiff's court dates the fact that they were never notified by subpoena. *See* Bishop Dep. at 68-69. Nevertheless, the Court notes here that to the extent that the facts undergirding the probable cause determination continue to be disputed, this precludes resolving the issue as a matter of law at to Detective Bishop. *See Kerr*, 171 F.3d at 340. However, the Court notes that the only allegation in the record against Detective Hill is that he witnessed the purported assault by Plaintiff against Bishop and filed a report to that effect. Hill Aff. at 1-2. As there is no other evidence involving Hill's participation or aid in the prosecution of Hunter

except for the filing of this report, the Court grants summary judgment qualified immunity to him as to this claim. *See Goodson*, 202 F.3d at 741.

**d. Claims of Violation of First Amendment**

The right of an American citizen to criticize public officials and policies and to advocate peacefully is the central meaning of the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). Thus, by arguing that he was denied photo opportunities because he carried a sign indicating disagreement with Congressman Sessions and/or Speaker Gingrich, *see* Pl.'s First Am. Compl. at 3, as well as alleging he was detained and arrested by Defendants for exercising his freedom of speech rights, Id. at 8, Hunter has stated a claim for a constitutional violation based on First Amendment grounds. *See Johnston*, 14 F.3d at 1061.

With regards to Detective Hill, as previously stated throughout this opinion, the Court does not find any support in the record in finding that Hill ever instructed or assisted Bishop in the detainment or arrest of Hunter on May 4, 1998. Thus, Hunter fails to allege sufficient involvement by Defendant Hill to lay a foundation for recovery under § 1983 for his constitutional infringements, and therefore qualified immunity will be granted to him as to Plaintiff's claims of First Amendment violation. However, since a genuine dispute as to the material and operative facts of this case exist with relation to Plaintiff's claims against Detective Bishop, seen by the differing accounts of these events as provided by the parties summary judgment evidence, the Court must deny qualified immunity for Defendant Bishop as to Plaintiff's First

Amendment claims. Summary judgment is inappropriate under these circumstances, unless the plaintiff's version of the violation does not implicate clearly established law. *See Id.*[6]

**III. [sic] Texas Official Immunity**

In addition to his federal claims, Hunter in his suit alleges causes of action against Defendants for assault, battery, false arrest and false imprisonment under Texas state law. Pl.'s First Am. Compl. at 10. Under Texas law, police officers are entitled to official immunity from such state law claims if the suit arises: (1) from the performance of their discretionary duties; (2) performed in good faith; (3) while acting within the scope of their authority. *See Jones v. City of Grand Prairie*, No. Civ. 3:97-CV-1907-H, 1999 WL 21047 at *8 (N.D. Tex. Jan. 6, 1999) (Sanders, S.J.) (*citing Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). If an action involves personal deliberation, decision and judgment, it is considered for purposes of the officer's state law official immunity, as a discretionary act. *See Id.* An officer acts in good faith in pursuit of a case if a reasonably prudent officer, under the same or similar circumstances, could have believed that his actions were lawful. *Id.* And finally, an official acts within the scope of his authority if he is discharging the duties generally assigned to him. *Id.*

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[6] The Court does not reach at this time Hunter's demand for a declaratory judgment "defining the rights of the plaintiff to peacefully protest and carry a protest sign without police interference." *See* Pl.'s First Am. Compl. at 10-11.

Because this Court has already held that a genuine issue of material fact exists as to whether Hunter was lawfully detained and arrested based on the disputed evidence before the Court, Defendant Bishop's motion for summary judgment must be denied. The Court cannot decide, as a matter of law, whether Bishop performed his duties "in good faith." However, to the extent that Plaintiff alleges any claims of assault, battery, false arrest and false imprisonment against Defendant Hill, for the reasons stated above, official immunity will be granted to him because of his noninvolvement in either Hunter's detention or arrest in this case.

## CONCLUSION

Accordingly, upon careful review of the parties' arguments and the relevant law, for the reasons stated previously, the Court concludes that Defendants [sic] Motion for Summary Judgment based on Plaintiff's federal claims of false detention, wrongful arrest, excessive force, malicious prosecution and violation of First Amendment, as well as Plaintiff's state law claims for assault, battery, false arrest and false imprisonment against Defendant Darvin Hill, shall be and are hereby GRANTED. Furthermore, the Court concludes Defendants [sic] Motion for Summary Judgment based on Plaintiff's federal law claims of false detention, wrongful arrest, malicious prosecution, excessive force and violation of First Amendment, as well as Plaintiff's state law claims of assault, battery, false arrest

and false imprisonment against Defendant Dwayne Bishop, shall be and are hereby DENIED.

**So Ordered.**

Signed this 28th day of September, 2001.

/s/ Jorge A. Solis

JORGE A. SOLIS

UNITED STATES
DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

| | | |
|---|---|---|
| **BRUCE HUNTER** | § | |
| | § | |
| **Plaintiff,** | § | |
| | § | |
| **VS.** | § | **CIVIL ACTION NO.** |
| | § | **3:00-CV-0933-P** |
| **DWAYNE BISHOP and DARVIN HILL,** | § | |
| | § | |
| | § | |
| **Defendants.** | § | |

**PLAINTIFF'S FIRST AMENDED COMPLAINT AND JURY DEMAND**

(Filed Oct. 10, 2000)

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

## INTRODUCTION

1. This is a civil action based on the United States Constitution and the common law for money damages. Plaintiff has been denied rights guaranteed to him by the United States Constitution. Because of the acts and omissions of Defendants Dwayne Bishop and Darvin Hill, Plaintiff was deprived of the right to carry a sign of protest indicating disagreement with a politician, falsely arrested, illegally incarcerated and maliciously prosecuted.

## JURISDICTION

2. Jurisdiction over this action exists by reason of the First, Fourth and Fourteenth Amendments to the United States Constitution, and by virtue of 28 U.S.C.

§§ 1331, 1343(3), and 1343(4). Plaintiff's claims are procedurally brought forth pursuant to 42 U.S.C. §§ 1983 and 1988. Plaintiff's common law claims arise from Texas common law and are brought forth pursuant to this Court's supplemental jurisdiction under 28 U.S.C. § 1367. The Plaintiff seeks a declaratory judgment pursuant to authority of 28 U.S.C. § 2201 and Fed. R. Civ. P. 57.

## VENUE

3. Defendants Dwayne Bishop and Darvin Hill reside in Dallas County, Texas, within the judicial district of this Court.

## PLAINTIFF

4. Plaintiff Bruce Hunter is a citizen and resident of the United States and the State of Texas and is over the age of eighteen (18) years.

## DEFENDANTS

5. Defendants Dwayne Bishop ("Bishop") and Darvin Hill ("Hill") are police officers employed by the City of Dallas, Texas. At all times pertinent hereto, each Defendant acted under the color of state laws and usage. Both Defendants are is [sic] sued in their individual capacity.

## FACTS AND CAUSES OF ACTION

6. Just prior to May 4, 1998 Congressman Pete Sessions and (then) Speaker of the House Newt Gingrich scheduled a "media" event in the City of Dallas' White Rock Lake Park. The television and print media were

notified. This park was chosen because Sessions and Gingrich wished to convey the impression that they were pro-environment legislators. Both Sessions and Gingrich planned to make a statement to the public via the media. Members of the public were invited to attend the event.

7. Sessions and Gingrich anticipated that this event would be a situation where television cameras would be present and they believed that their staged media event in this park would be an opportunity, if photographed with the park in the background, that any resulting photograph would convey the impression that their care and concern for the environment was paramount. To this end Sessions and/or Gingrich wished and requested that persons/protestors with signs indicating that Sessions and Gingrich's environmental record was not pristine be kept away from them. This request was made so that persons with signs would be out of the view of any photo opportunity. The Defendants were aware of Sessions' and Gingrich's desire and agreed to keep persons with signs adverse to Sessions and Gingrich away from them, thus the Defendants agreed to deny photo opportunities, with signs adverse to Gingrich or Sessions, to occur. The Defendants, in conjunction with other police officers, agreed to use the false need for security to protect Sessions and Gingrich as a cover for keeping persons with signs indicating any disagreement with Sessions or Gingrich opinions, etc. away from Sessions and/or Gingrich.

8. The Plaintiff is a retired sixty-seven (67) year old man who disagreed with Sessions' and/or Gingrich's views on environmental matters. The Plaintiff elected to attend this event.

9. On or about May 4, 1998 the Plaintiff arrived for the aforementioned media event at White Rock Lake Park. A podium had been erected and a rope barrier was constructed to separate the public from the speakers' podium. The Plaintiff, members of the public and the print and television media were also in attendance. The total number of people who attended this "media" event did not exceed twenty-five to thirty individuals. This number included Gingrich, Sessions, their aides, two Washington D.C. police officers, Defendants Bishop and Hill, two to three uniformed Dallas police officers, a Dallas Morning News photographer, a Dallas Morning News reporter, a Channel 8 television news videographer, a Channel 8 reporter, the Plaintiff and eight to ten interested and curious individuals. Both Bishop and Hill did not wear police uniforms nor did they openly display their police badges or their police identification. The Plaintiff carried a cardboard sign in his hands that covered his chest area. The Plaintiff's sign read "Pete Sessions – Don't use the environment to look Green." Three to four other persons in attendance also carried signs.

10. Both of the Defendants unlawfully, unjustifiably and unconstitutionally regard any person who displays a sign at any public gathering which in any manner conveys, no matter how innocuous, any disagreement with a politician's view, as a person who poses a physical threat to the politician. Because the Plaintiff carried a small cardboard sign that said "Pete Sessions – Don't use the environment to look green", on this basis alone, the Defendants falsely concluded that the Plaintiff somehow some way posed a physical threat to the physical integrity to either Sessions or Gingrich. This false conclusion was made in spite of the fact that the Plaintiff, on May 4, 1998, never used

language or did any act that would indicate to any reasonable or rational person that the Plaintiff posed a physical threat to anyone, including either Gingrich and/or Sessions. In the name of "security" the Defendants claim the right to harass and to impose sanctions and restrictions on any citizen who carries a "protest" sign. Both of the Defendants unlawfully believe that it is within their police powers to accost and detain any citizen who wishes to convey a message to a politician through the use of a protest sign. On May 4, 1998 the Defendants falsely believed that reasonable suspicion to cause physical harm to a politician included the power to detain a citizen and demand identification from that citizen solely upon the basis that the citizen carried a "protest" sign.

11. The Plaintiff positioned himself on the opposite side of the rope barrier separating the speaker's podium from the audience. This was approximately fifteen to twenty feet from the podium. The Plaintiff had the cardboard sign positioned in his hands in front of his chest area. Defendant Bishop positioned himself next to the Plaintiff. Bishop informed the Plaintiff he was a Dallas police officer and unlawfully indicated that he did not want the Plaintiff to be located where he was. The Plaintiff told Bishop that he intended to be near the front of the gathering because he wanted to hear Sessions' and Gingrich's statements. The Plaintiff also hoped that his sign would be photographed as well as seen by all in attendance. Bishop unlawfully told the Plaintiff, with the intent to prevent the Plaintiff from exercising his First Amendment rights of speech and/or assembly, to maintain a distance from the speakers. Similar statements were not conveyed to individuals who did not carry and/or display signs. Neither Bishop nor Hill confronted anyone who did

not carry a sign nor did either Defendant attempt to restrict the movement or position of any person who did not carry a "sign". Bishop then positioned himself in front of the Plaintiff to obstruct the view of the message on the Plaintiff's sign from those who used the speakers' podium.

12. After the Sessions and Gingrich speeches and the remainder of the event was concluded, the Plaintiff started to make his way towards the park's exit and to the motor vehicle that brought him to the location. At this point, without cause or justification, Defendant Bishop grabbed the Plaintiff's left wrist and, without cause or legal justification, demanded that the Plaintiff produce identification. The Plaintiff replied that his identification was in his left rear pocket and that in order to retrieve his wallet and obtain identification Bishop would need to release his wrist. Bishop initially refused but then allowed the Plaintiff to retrieve his wallet. As soon as this was done the Plaintiff was advised that he was under arrest by Hill and Bishop and he was handcuffed and taken to the Dallas County Jail.

13. At no time did the Plaintiff commit any offense, including assault. After two hours of incarceration the Plaintiff was allowed to post bail for the non-existent charge of "assaulting" Dwayne Bishop. The Plaintiff was advised that this charge of assault was to be brought in Dallas Municipal Court. The Plaintiff appeared in Court on several occasions. In late 1998 the Plaintiff was advised that the case was set for trial on January 21, 1999 but because Bishop and Hill did not appear as witnesses against the Plaintiff, the Dallas City Attorney dismissed the charge before the Judge could call the case for trial. To further harass and inconvenience the Plaintiff, the Dallas City Attorney, at the request of Defendants Bishop and

Hill, re-filed the charge of assault against the Plaintiff. The Plaintiff appeared in Court again on April 12, 1999, ready for trial, however the City Attorney dismissed the charge against the plaintiff a second time because neither Hill nor Bishop appeared for the trial. Both charges of assault were filed by Defendants Hill and Bishop even though both of them knew that the charges were false and baseless.

14. Plaintiff would show that at the time of his arrest and prosecutions both Defendants acted in bad faith and in an objectively unreasonable manner by arresting and then prosecuting the Plaintiff for "assault". The Plaintiff did not assault Dwayne Bishop and the only persons guilty of assault were Bishop, Hill and the other police officers. All of these individuals assaulted the Plaintiff.

15. Plaintiff would show that based on the foregoing facts as described above, a reasonable peace officer could not conclude that probable cause existed to justify either the Plaintiff's arrest or their assault of the Plaintiff on May 4, 1998.

16. Plaintiff would show that, based on the foregoing facts and circumstances, no reasonable police officer could conclude that the carrying of a protest sign constituted a basis to detain a citizen and demand identification.

17. Plaintiff would show that, based on the foregoing facts and circumstances, no reasonable police officer could conclude that a police officer could lawfully require an individual to confine himself to a particular designated area just because the citizen carried a "protest" sign that conveyed a message perceived to be adverse to a politician or the politician's beliefs or positions.

18. The Plaintiff sues the Defendants for falsely detaining/and or stopping him and/or assaulting him on or about May 4, 1998. When the Plaintiff was detained, and/or stopped, the Defendants did not have a reasonable suspicion that the Plaintiff had committed a crime or that he was about to commit a crime. In the name of "security" no American citizen is legally obligated to produce identification or to be subjected to a detention or stop.

19. Plaintiff sues the Defendants for falsely arresting him on or about May 4, 1998. When Plaintiff was arrested by the Defendants, they knew that there was no probable cause to believe that Plaintiff had violated any criminal law including an assault of Dwayne Bishop. This seizure of Plaintiff violated the First and Fourth Amendments to the United States Constitution because the arrest was not based upon probable cause, was unreasonable, and the true motive for the arrest was to cover-up the Defendants' illegal conduct and/or was punishment for exercising First Amendment rights through the use of a protest sign.

20. Plaintiff sues Defendant Bishop and Defendant Hill for maliciously prosecuting him on January 21, 1999 and April 12, 1999 for the crime of assault. Plaintiff could not have been guilty of assault on May 4, 1998 as neither Defendant had sufficient cause to believe that the Plaintiff should have been arrested on May 4, 1998. The Defendants instituted the Plaintiff's prosecution on January 21, 1999 and April 12, 1999. The criminal case instituted by the Defendants against the Plaintiff ended in the Plaintiff's favor on both occasions, as there was no probable cause to initiate the Plaintiff's prosecution and the Defendants acted with malicious intent when they instituted the Plaintiff's prosecution. The Dallas Municipal Court

dismissed the charges against the Plaintiff because the evidence was insufficient to support a prosecution for assault as a matter of law.

21. The individual Defendants separately, and in concert with others unknown to Plaintiff, acted outside the scope of their jurisdiction and without authorization of law. Each of the Defendants acted willfully, knowingly and purposely with the specific intent to deprive Plaintiff of his right to be free from an illegal detention or stop for exercising protected First Amendment activities, assault, false arrest as well as the Plaintiff's right not to be subjected to an illegal seizure in the form of a malicious prosecution.

22. For the violations of rights guaranteed to Plaintiff by the United States Constitution, as set out above with the attendant mental anguish and fear, Plaintiff sues each Defendant for a sum of not less than $50,000.00 for each Constitutional violation so specified, i.e., illegal arrest, illegal stop or detention, abridgment of First Amendment protected activity, malicious prosecution and the use of excessive force.

23. The acts of the Defendants resulting in the illegal assaults and/or seizures of the Plaintiff, the accompanying fear and mental anguish, amounted to such a malicious, willful, wanton, reckless, grossly negligent and total disregard of Plaintiff's Constitutional rights that exemplary damages should be recoverable in this cause by Plaintiff. The acts of the Defendants, acting in their individual capacity, were so flagrant as to offend a public sense of justice and propriety. Such conduct should be justly punished to deter future conduct. Accordingly, Plaintiff sues for judgment from the Defendants in their

individual capacity for exemplary damages in a sum of not less than $50,000.00.

24. In addition to the federal claims as set out above, Plaintiff has claims under Texas law against the Defendant for the acts and omissions set out above, which constitute the torts of assault, battery, false arrest and false imprisonment. Plaintiff sues the Defendants for the same compensatory and exemplary damages under his state law claims as he has prayed for pursuant to his federal claims.

25. Pursuant to 28 U.S.C. § 2201 and Fed R. Civ. P. 57, the Plaintiff requests the Court to declare that included within the protections granted to all citizens by the First Amendment of the United States Constitution is the right to carry a protest sign at any public event without being arbitrarily confined by the police to any particular area or place and that a citizen has a right to peaceably carry a sign in a public place without being required by the police to identify himself or present photo identification merely because the citizen peaceably carries or displays a protest sign.

**JURY DEMAND**

26. Plaintiff demands a trial by jury.

WHEREFORE, Plaintiff prays that this Court:

1. Assume jurisdiction of this cause;

2. Grant to Plaintiff a trial by jury herein;

3. Award to Plaintiff a judgment against Defendants for the damages set out herein above, including exemplary damages together with prejudgment and post-judgment interest thereon;

4. Award the costs of prosecution of this action to Plaintiff;

5. Award to Plaintiff, from Defendants, reasonable attorney's fees for the prosecution of this action;

6. Award to Plaintiff such other additional or alternative relief as may appear to the Court to be proper; and

7. Enter a declaratory judgment defining the rights of the Plaintiff to peaceably protest and carry a protest sign without police interference.

Respectfully submitted,

THE LAW OFFICE OF
DOUGLAS R. LARSON
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By: /s/ Douglas R. Larson
Douglas R. Larson
State Bar No. 11958000

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument has been served to Mr. Mark Goldstucker, Assistant City Attorney, 7BN Dallas City Hall, 1500 Marilla Street, Dallas, Texas 75201 by certified mail, receipt requested, on this the 20th day of September, 2000.

By: /s/ Douglas R. Larson
Douglas R. Larson

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

| | | |
|---|---|---|
| BRUCE HUNTER<br>Plaintiff, | § | |
| v. | § | CIVIL ACTION NO. |
| DWAYNE BISHOP and<br>DARVIN HILL,<br>Defendants. | § | 3-00-CV-0933-P |

**AFFIDAVIT OF DWAYNE BISHOP**

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, personally appeared Dwayne Bishop, who, after being by me duly sworn, deposed and stated as follows:

"My name is Dwayne Bishop. I am of legal age and have never been convicted of any felony or crime involving dishonesty. I am a police officer employed by the City of Dallas Police Department. I have been employed as a police officer since September 13, 1982. I have personal knowledge of the matters set forth herein, and am competent to make this Affidavit, and make it in support of Defendants' Motion for Summary Judgment. The statements herein are true and correct to the best of my knowledge and belief.

On May 4, 1998, I was working in plain clothes as a police officer for the City of Dallas, Texas. I was assigned to provide security at a speaking engagement at White Rock Lake Park by then-Speaker of the U.S. House of

Representatives Newt Gingrich and Congressman Pete Sessions. Dallas police officer Darvin Hill was also assigned to the plain-clothes security detail. In addition, two officers of the United States Capitol Police and several uniformed Dallas police officers were present.

When I arrived at White Rock Lake Park, prior to the speeches, a man (subsequently identified as Howard Hunter and subsequent to that identified as Plaintiff Bruce Hunter) and several women were holding signs and standing together fifteen to twenty feet from the speaker's podium. I approached the persons holding signs, identified myself as a Dallas police officer, and asked them not to move any closer to the podium during the speeches. I asked them not to move closer for security reasons and in order to prevent any disruption of the speeches. Plaintiff asked me for identification, so I showed him my badge and gave him my business card. The people in the group agreed to my request.

During Mr. Gingrich's speech, Plaintiff began moving closer to Mr. Gingrich. I went over to Plaintiff and instructed him not to move any closer to Mr. Gingrich. Plaintiff was still holding his sign. He did not articulate any reason for wanting or needing to move closer, such as an inability to hear or see Mr. Gingrich. Because Plaintiff began moving closer after being asked not to, and because I was responsible for security at the event, I perceived Plaintiff's actions as a possible threat to the safety of Mr. Gingrich. Due to these concerns, I stood beside Plaintiff. A uniformed Dallas police officer was also nearby. At that point in time, I had had no physical contact with Plaintiff.

Almost immediately after my instruction to Plaintiff not to move any closer to Mr. Gingrich, Plaintiff again

moved toward Mr. Gingrich. I then asked Plaintiff for his identification because, due to his moving closer to Mr. Gingrich after being instructed not to, I perceived Plaintiff as a possible threat to the safety of Mr. Gingrich. Plaintiff refused to give me his identification and continued to move toward Mr. Gingrich. I told Plaintiff he could not go any farther and grabbed his arm to stop him from moving any closer.

I again asked Plaintiff for identification. Plaintiff then struck my arm several times and told me to let go of him. The uniformed officer grabbed Plaintiff's other arm and we walked Plaintiff about ten feet farther away from the podium. I placed Plaintiff under arrest for assault for striking me on the arm and handcuffed him. Plaintiff was taken to jail by uniformed Dallas police officers.

I did not enter into an agreement with anyone to prevent or obstruct individuals with views different than those of Mr. Gingrich from expressing their views or holding protest signs. I was not attempting to prevent Plaintiff from carrying his sign, from protesting or from attending the speeches. I would not have taken the above-described actions as to Plaintiff had he not continued to move toward Mr. Gingrich after I instructed him not to. I instructed Plaintiff not to move closer to Mr. Gingrich solely to prevent any possible attempt to harm Mr. Gingrich, which was my job assignment and responsibility. The other people carrying signs, who did not attempt to move toward Mr. Gingrich, were permitted to hold their signs, exercise their free speech rights, and remain present for the speeches without incident.

During this incident, I used only the force reasonably necessary to prevent Plaintiff from continuing to approach Mr. Gingrich after Plaintiff had been instructed not to do

so, and to place Plaintiff under arrest for assault. At no time did I use more force than I believed reasonable and necessary to protect against what I perceived as a possible threat to the safety of Mr. Gingrich, and to arrest Plaintiff for assault.

At all times during this incident, I was acting within the scope of my discretionary authority as a police officer. As shown by the above-stated facts, a reasonable police officer in the same or similar circumstances could have believed my actions to be objectively reasonable in light of clearly established law and the information known to me at the time. As further shown by the above-stated facts, my actions as to Plaintiff were consistent with federal and state law concerning the protection of government officials, the preservation of the peace during a political speech, arrest, and use of force, and I did not violate clearly established law of which a reasonable person would have known."

/s/ Dwayne Bishop #4754
DWAYNE BISHOP

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on the 10th day of November, 2000.

/s/ Greg Gates
NOTARY PUBLIC IN AND
FOR THE STATE OF TEXAS

[SEAL] GREG GATES
Notary Public State of Texas
My Commission Expires
11/01/2001

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

| | | |
|---|---|---|
| BRUCE HUNTER, | § | CIVIL ACTION |
| Plaintiff, | § | NO. 3-00-CV-0933-P |
| | § | |
| v. | § | |
| | § | |
| DWAYNE BISHOP and | § | |
| DARVIN HILL, | § | |
| Defendants. | § | |

AFFIDAVIT OF DARVIN HILL

| | |
|---|---|
| STATE OF TEXAS | § |
| | § |
| COUNTY OF DALLAS | § |

BEFORE ME, the undersigned authority, personally appeared Darvin Hill, who, after being by me duly sworn, deposed and stated as follows:

"My name is Darvin Hill. I am of legal age and have never been convicted of any felony or crime involving dishonesty. I am a police officer employed by the City of Dallas Police Department. I have been employed as a police officer since April 19, 1982. I have personal knowledge of the matters set forth herein, and am competent to make this Affidavit, and make it in support of Defendants' Motion for Summary Judgment. The statements herein are true and correct to the best of my knowledge and belief.

On May 4, 1998, I was working in plain clothes as a police officer for the City of Dallas, Texas. I was assigned to provide security at a speaking engagement at White

Rock Lake Park by then-Speaker of the U.S. House of Representatives Newt Gringrich and Congressman Pete Sessions. Dallas police officer Dwayne Bishop ("Bishop") was also assigned to the plain-clothes security detail. In addition, two officers of the United States Capitol Police and several uniformed Dallas police officers were present.

When I arrived at White Rock Lake Park, prior to the speeches, a man (subsequently identified as Howard Hunter and subsequent to that identified as Plaintiff Bruce Hunter) and four or five women were holding signs and standing together fifteen to twenty feet from the speaker's podium. Bishop approached the persons holding signs and talked to them. I remained with Mr. Gingrich by the podium. I did not hear the conversation between Bishop and the persons with the signs.

As Mr. Gingrich was finishing his speech, Plaintiff began moving toward Mr. Gingrich. Plaintiff appeared to be angry or upset. Bishop was facing Plaintiff. Bishop took a couple of steps back. Bishop had one hand up and the other hand on Plaintiff's arm. Plaintiff then struck Bishop several times on the arm.

I began to move with Mr. Gingrich to the van in which we would leave the park. Plaintiff appeared at that time to be under arrest. I later prepared an offense report and arrest report for assault by Plaintiff on Bishop. The information in those reports was in part provided to me by Bishop and in part from my own observations and knowledge.

I did not participate in the arrest of Plaintiff, other than to prepare the above-mentioned reports after Plaintiff had already been taken to jail. I used no force against Plaintiff and did not have any physical contact with

Plaintiff at any time during this incident, nor did anyone have any physical contact with Plaintiff at my direction. I did not see Bishop or any other police officer use any force against Plaintiff other than that reasonably necessary to prevent Plaintiff from approaching Mr. Gingrich, and to place Plaintiff under arrest for assault.

I did not enter into an agreement with anyone to prevent or obstruct individuals with views different than those of Mr. Gingrich from expressing their views or holding protest signs. I did not attempt to prevent Plaintiff from carrying his sign, from protesting, or from attending the speeches. The other people carrying signs, who did not attempt to move toward Mr. Gingrich, were permitted to hold their signs, exercise their free speech rights, and remain present for the speeches without incident.

Bishop and I, along with the other law enforcement officers present, were responsible for the safety of the persons giving speeches, as well as keeping the event peaceful and preventing disruptions. In doing so, persons carrying protest signs would have been instructed to stay a reasonable distance from the speakers, both for the safety of the speakers and to allow others in attendance to hear and see the speakers without disruption. If a person carrying such a sign ignored a police officer's instructions and began moving closer to one of the speakers, it would be the officer's duty and responsibility to stop the person from moving closer. This would include using physical force or restraint if reasonably necessary. The officer has no way of knowing the intent of the person, and must act with regard to preventing harm to the speakers and disruption of the speeches.

At all times during this incident, I was acting within the scope of my discretionary authority as a police officer. As shown by the above-stated facts, a reasonable police officer in the same or similar circumstances could have believed my actions to be objectively reasonable in light of clearly established law and the information known to me at the time. As further shown by the above-stated facts, my actions as to Plaintiff were consistent with federal and state law concerning the protection of government officials, the preservation of the peace during a political speech, arrest, and use of force, and I did not violate clearly established law of which a reasonable person would have known."

/s/ Darvin Hill
DARVIN HILL

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on the 13th day of November, 2000.

/s/ Robert E. Pierson
NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS

[SEAL] ROBERT E. PIERSON
Notary Public
STATE OF TEXAS
My Commission Expires 05-02-2001

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

| | | |
|---|---|---|
| BRUCE HUNTER,<br>Plaintiff | §<br>§ | |
| vs. | § | CIVIL ACTION NO. |
| DWAYNE BISHOP and<br>DARVIN HILL, | §<br>§ | 3:00-CV-933-P |
| Defendants. | § | |

**AFFIDAVIT OF BRUCE HUNTER**

| | |
|---|---|
| STATE OF TEXAS | § |
| | § |
| COUNTY OF DALLAS | § |

BEFORE ME, the undersigned authority, on this day personally appeared the undersigned affiant, who, being duly sworn, on oath stated:

"My name is (Howard) Bruce Hunter. I am over the age of eighteen years, of sound mind, literate in the English language and have personal knowledge of the matters contained in this affidavit. I have never been convicted of a crime involving moral turpitude, and I am capable of making this affidavit. All of the facts stated herein are within my personal knowledge and are true.

"I formerly taught mathematics, computers and business law in Dallas high schools, I also taught at Eastfield College for some years. In 1975 I founded by [sic] own successful home improvements and products development business. I am presently retired and my business is inactive. I am 68 years of age. I am 6' 1" and

weigh 150 lbs. I have never been arrested prior to the events described herein.

"I have served on the Dallas Community Relations Commission and I have served for many years as a member of the Religious Community Taskforce of the DISD's Community Network. I am an officer in several non-profit groups. I am a former precinct chair and an election Judge. I am presently a committee chair in the DFW GreenAlliance and am founder-director of Men for Reproductive Responsibility (MRR). I write on political, environmental and other issues.

"At the time of my arrest I was a member and officer (chair, Global Warming committee) of the Dallas Sierra Club. On May 4, 1998 I met mid-morning with other Sierra Club officers at the home of Dr. John and Margie Haley. The Haley's [sic] address is 7149 Hill-green Drive. This is across Lawther Drive from the White Rock Park. On May 4, 1998 former-Speaker of the House, Newt Gringrich, and Congressman Pete Sessions were scheduled to speak on environmental matters. This was to occur in White Rock Lake Park and the "speech" was arranged by a local organization, For The Love Of The Lake (FTLOTL). The "event" that [sic] was to take place in White Rock Lake Park. There was [sic] no restrictions announced as to who could or could not attend the "event". Some of the persons who were present at the Haley home had elected to carry paste-board signs with hand written messages on them. The messages were intended to convey mild dissatisfaction and disagreement with Congressman Pete Sessions and Newt Gingrich's environmental positions.

"It was my intention and as far as I know all of the persons who elected to carry signs to peacefully and lawfully demonstrate our dissatisfaction with the environmental records of these two congressmen. There was no intention on the part of any of us to cause any disruption whatsoever, and the signs we carried were not mounted on sticks and were constructed of thin flexible pasteboard, about 24x32 inches, and were carried next to our chests so as not to interfere with the view of any other spectator. I fully expected to be allowed full access to Speaker Gingrich and Congressman Sessions on a par with any other person and I expected to be allowed to display the sign I carried. I also planned to take part in any "Q&A" session which might follow the formal statements from the two congressmen. I firmly believed that I had the right under the First Amendment of the U.S. Constitution to fully participate. While I was at White Rock Lake Park on May 4, 1998, no one appeared to pose a threat to anyone nor was there any sort of disturbance nor did anyone interrupt any of the speakers. I did not have anything on my person that someone could have believed was a weapon. I was totally unarmed.

"White Rock Lake Park is a public park owned and operated by the City of Dallas. There was no sign posted at any place within the park which restricted anyone's lawful use of the facilities. The place where Gingrich and Sessions were scheduled to speak was located in a public picnic area. The speeches were delivered from a concrete pad approximately 12' x 12', originally intended to be used as a platform for a picnic table. For the May 4, 1998 event, the picnic table had been taken off the concrete pad and replaced by a speakers lectern.

"As we reached the White Rock Park's Lawther Dr. shoulder we were temporarily stopped by an unidentified man in street clothes, and we were told that 'protesters' could not enter. I asked if this event was being held on private property, and if there were any restrictions on who could attend or a written regulation or rule that spectators with signs could not enter. The man admitted that the event was on publicly owned land and that there was [sic] in fact no restrictions, rules or regulations that would prohibit our entry. So I proceeded into the park.

"I got only about ten feet further when a well-dressed man approached me and the group. This man introduced himself to me as the president of the host organization (FTLOTL), and he also asked that we proceed no further. I asked the same questions I had asked the first challenger and, after being given the same answers, we were allowed a second time to proceed.

"After only a few more steps, a Channel 8 TV news reporter, Mr. Doug Fox, began interviewing Margie Haley and the other persons who were with me stopped to listen to the interview. I realized that the speeches were about to begin, I left the others and proceeded alone toward the speakers' podium. I had only gone eight to ten feet or so when a uniformed Dallas policeman, asked me, "Sir, are you with that group?"

"Not clearly understanding which 'group' he had in mind, and becoming increasingly confused and mildly annoyed by the continued challenged (this being the third!) I asked to speak to his supervisor, hoping to get a 'final clearance' to hear the talks. The officer referred

me to a sergeant near a Dallas Police Department squad car on the parking lot adjacent to the park. I expressed my growing concerns to the police sergeant and asked him if I was going to be allowed to exercise my First Amendment rights. He replied, "No one is going to interfere with your First Amendment rights today!" The sign I was carrying in front of my chest area was clearly visible but I was told nothing about there being a designated area for people carrying signs nor did the sergeant advise me that I was to be confined to a certain area.

"Reassured once again and unaccompanied by the other persons carrying signs who entered the park with me, I approached the podium area, where about fifteen to twenty people had gathered, when Detective Bishop introduced himself and asked if there was a problem. I introduced myself, we shook hands, he gave me his business card – which I had requested – and I explained at that time that I just wanted to find a place near the podium so as to hear the speakers, just like the people without signs. Neither at that point nor at any other time did Det. Bishop or anyone else tell me, ask me or suggest to me that there was some designated area of the Park I should go to or be confined to during this event.

"'Just keep a distance from the Speaker', Bishop said, and he proceeded to walk with me as I took the position as shown in the Dallas Morning News photo of May 3, 1998. But Det. Bishop then positioned himself obliquely facing me so as to partially obscure my sign from the speakers' podium. So when I noticed the photographer lining up to take the News picture I politely pointed out to him that it might not look good for him to be shown blocking my sign, and asked him if he would

please move to one side. Bishop moved from in front of me, but not before telling me, 'If you cause a disturbance we're taking you downtown.' There was no reason for him to make this statement as I had not given him any reason to believe I was going to cause a disturbance or that I was going to be a threat to anyone, nor had I said anything or acted in a manner that someone might reasonably perceive to be a threat to anyone or that I would cause a disturbance. I even politely applauded the speakers as did most everyone else. A true and correct copy of the resulting photo is attached hereto and marked Exhibit "A". (In Exhibit "A" I am the person in the right third of the photo wearing sunglasses with a sign covering my torso. There are four police officers in the immediate area, three of which are very close to me.)

"When both Gingrich and Sessions had finished their talks, the FTLOTL host thanked everyone for coming, thusly concluding the event. Most of the audience began moving toward the park exit and the parking lot. Det. Bishop was walking uncomfortably close beside me to my left, effectively preventing me from fully turning left toward Lawther and my car's location, and I immediately realized that Bishop was putting me in a very tenuous situation. Hoping to reduce the tension without further incident, I continued in the same direction towards the park exit with Det. Bishop walking beside me. I said, "Well, I guess a bit of non-violent demonstration didn't hurt anything after all!"

"He then immediately and without any warning whatsoever grabbed my left wrist with his left hand and, while clutching it very tightly, asked me for identification. Since my wallet was in the left rear pocket of my pants, with flap buttoned and covered entirely by my

suit coat, and as I held the sign in my right hand, I saw no way I could comply with his demand. I told him calmly that if he'd turn loose of my arm I'd get the ID for him.

"But this he refused to do, continuing to squeeze my left wrist very hard, and I began to realize, with mounting concern, that Bishop was not acting in a rational or reasonable manner. For a police officer to handle my completely courteous and innocuous 'demonstration' (carrying a sign that said: "Pete Sessions is no environmental hero.") in such an unexpected, violent, offensive and provocative manner put me under considerable stress.

"For all I knew other police might join in and I might be clubbed to the ground at any moment – or even shot – so I decided I should try to attract the attention of others before everyone left the scene and I'd find myself at the mercy of an out-of-control police officer with no witnesses around.

"So, raising my right hand about two and a half feet in the air, in order to make it very visible, I very slowly lowered it in a prolonged arc motion until it barely touched his clenched hand, on which I hoped to focus a potential witness' attention, all the while urging him in a raised voice to let go of me. This was by no stretch of imagination a 'blow', nor could it possibly have caused the slightest pain or discomfort whatsoever. (Another officer with whom I spoke the very next day, quoted Bishop as having admitted that he was "not hurt"!) Had a mosquito fallen asleep on Det. Bishop's clenched hand beneath my slowly descending hand, this insect might have been shaken up but certainly not killed or injured by either of my carefully controlled, highly theatrical gestures. No reasonable

person who had observed these events could have concluded that what I did was either offensive or provocative.

"Bishop next grabbed my left upper arm with his right hand and forcibly pushed up on it in a rude and provocative manner. Because of his unnecessary use of force, I concluded that Bishop was trying to get me to fight with him, but I knew that would be a foolish, illegal and a dangerous way to respond, so I just kept using my elevated voice asking for him to release me, which he finally did, but not before jabbing me in the chest with the extended forefinger of his right hand. I immediately then used my now-freed left hand to retrieve my wallet and I handed him my driver's license.

"Apparently Bishop was hoping to find that I was wanted for some crime, so he [sic] would have provided to him a convenient excuse for arresting me, but even though this wasn't the case, after he had inspected my driver's license, he forcibly handcuffed me and had me taken downtown to the County Jail under arrest. After I was incarcerated for five and one-half hours, I was released after bail was posted on a charge of Class C Assault. I do not believe that Bishop actually believed I had assaulted him because if I had assaulted him, he would not have totally released me and allowed me to retrieve my driver's license from my rear pocket. Bishop gave my driver's license to another officer who left the vicinity of where Bishop had stopped me. It was several minutes before Bishop put the handcuffs on me. This occurred immediately after the officer who had been given my license returned.

"Exhibit "A" which attached hereto depicts me in the presence of four police officers. I never got any closer to either Sessions or Gingrich than what this photo (Exhibit

"A") depicts. I never made any attempt to get closer than what this photo depicts to either Gingrich or Sessions. I never disobeyed an order or request from anyone not to get close to any speaker at this event. Both Sessions and Gingrich and a man who had introduced them and closed the program had finished their short presentation before I moved from the location depicted in the photo. When I moved from the location depicted in the photo, I turned to my left to exit the park. I was not moving in the direction of the congressmen and other speakers. No reasonable person could have interpreted my actions in turning left as an attempt to get closer to either congressman than I had been. It was apparent that the event was over and that no one was going to get an opportunity to ask questions or speak to the congressmen. This is because the speakers at the event had left the podium area and the concrete pad and they were in the process of getting into the van that had brought them to the event in order to leave.

"During the entire time when Gingrich, Sessions and the program sponsors were speaking, there were several individuals who were not carrying signs who were much closer to the speakers than I was. I observed no attempt to restrict the movement of any of these individuals. Because of this, and because I was arrested, I believe it is fair to conclude that persons with signs were not treated the same as persons without signs. After the program was finished and when I was in the process of being questioned and being assaulted by Bishop, there were several individuals who were not carrying signs in the immediate vicinity. In the Dallas Morning News photo (Exhibit A) immediately to my rear, there were three individuals who were also carrying protest signs. Including media persons, the speakers at the event, and the police, there could not

have been more than twenty-five to thirty people who attended this event.

"While I was being placed under arrest, there were several people very nearby who were obviously not police officers. One of them was a white-haired elderly woman. Another was a young man in a green sport jacket with a red badge. There was also a young woman with dark hair and a gray jacket facing Officer Bishop. Nearby was also a young blonde headed woman and a man with a white shirt and a microphone. None of these people appeared to be police officers and, if I somehow posed a threat to either Speaker Gingrich or Congressman Sessions, then these people must have posed a similar threat as well. However, none of these persons were confronted by any police officer, as far as I know.

"In August of 1998 I had to appear in Dallas Municipal Court to answer to the charge of the Class C misdemeanor crime of "assault." I knew that I was absolutely not guilty of this offense and after studying the wording of this statute carefully, I went into Court prepared to defend myself against this false and spurious charge. I was chagrined, disappointed and offended when neither Hall [sic] nor Bishop appeared. I was told by the Municipal Judge that the charges were dismissed and that I was excused.

"Hill and Bishop then re-filed their false charge of Class C Assault, and so I had to go back to Court to answer this false charge for a second time. Once again I appeared in Court at the appointed time in 1998. Once again I was well prepared to answer the charge and eager to learn my accuser's testimony. But, once again, the Defendants failed to appear and I was once again excused.

"The failure of the Defendants to show up and make their case against me on either of the two court trial dates on which the charges against me were set for trial denied me the right to face and question my accusers. Because the charges were filed twice and because both Hill and Bishop knew that I did not assault Bishop, there is no reason for anyone to believe that the filing of the charges was an innocent mistake. Rather, it can only be that Bishop and Hill were trying to cover up their illegal actions in arresting me for my insistence on my right to peaceably attend a public event and carry a protest sign.

"The infringement of my First Amendment rights to freedom of speech and freedom of assembly and of my right to be free from unreasonable search and seizure were extremely discomforting. The discomfort was magnified several fold by the pain and humiliation I suffered at being physically and very forcibly grabbed, squeezed, jostled and jabbed by Bishop, then handcuffed and jailed for five and one-half hours on the absolutely false and malicious charge made against me by both Hill and Bishop. Plus, the worry, many sleepless nights, trips to Court and to attorney's office and losses of time (countless hours!), all at considerable expense, which I have already expended in my efforts to have this injustice rectified."

Further Affiant sayeth naught.

/s/ Bruce Hunter
BRUCE HUNTER, Affiant

STATE OF TEXAS §
§
COUNTY OF DALLAS §

SWORN AND SUBSCRIBED TO before me the undersigned authority by the said Bruce Hunter on this the 14th day of December, 2000.

[SEAL] TERISA D. HUNTER
MY COMMISSION
EXPIRES
September 8, 2001

/s/ Terisa D. Hunter
NOTARY PUBLIC,
STATE OF TEXAS

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[Exhibit A – Not Reproduced In Printing]

Supreme Court U.S.
FILED
JAN 27 2003
OFFICE OF THE CLERK

No. 02-994

IN THE

# Supreme Court of the United States

DWAYNE BISHOP,

*Petitioner,*

*v.*

BRUCE HUNTER,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## BRIEF IN OPPOSITION

DOUGLAS R. LARSON
LAW OFFICES OF DOUGLAS R. LARSON
410 West Main Street, Suite 101
Mesquite, Texas 75149
(972) 329-0160

*Counsel for Respondent*

178708

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

Respondent Bruce Hunter, hereby requests that the Supreme Court deny Petitioner's, Dwayne Bishop, application for a petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. In opposition to this application for writ of certiorari, Respondent would respectfully show the court the following:

## STATEMENT OF THE CASE

The Petitioner has failed to accurately portray the facts from the point of view of his opponent (the Respondent) in this summary judgment case in compliance with FRCP 56. The events leading to the Respondent's 42 U.S.C. § 1983 claim for violations of the Fourth Amendment occurred on May 4, 1998. The Respondent's arrest, etc. occurred at the end of a political event located in a public park. The event was staged by two politicians to create the impression that they were "supporters" of a pristine environment. The public and press were invited. The Respondent and other Sierra Club members elected to attend and carry protest signs. Before the event, Hunter entered the park with his pasteboard protest sign and positioned himself where he could hear the politicians' remarks. During the politicians' remarks, Bishop positioned himself near Hunter and attempted to block the view of Hunter's protest sign.

After the event concluded, Hunter began to make his way to the park exit when Bishop grabbed his wrist and demanded that Hunter produce identification. After Hunter protested and loudly requested Bishop to release him, Bishop released his hold on Hunter's arm which allowed Hunter to retrieve his wallet from his rear pocket. Shortly after this occurred Bishop jabbed Hunter in the chest and then forcibly handcuffed Hunter and had him transported to jail. Hunter

was charged, at Bishop's request, with the misdemeanor assault of Bishop. After his release, Hunter appeared at the trial of the assault charge. The charge was dismissed when Bishop failed to appear for the trial. The assault charge was re-filed and, again, Hunter appeared for trial. Bishop failed to appear and the charge was dismissed a second time.

## REASON FOR DENYING THE PETITION

### I.

### PETITIONER CANNOT ESTABLISH THAT EITHER THE DISTRICT COURT OR THE PANEL OPINION IS ERRONEOUS ON THE MERITS.

Unless this Court wishes to reconsider the body of law concerning qualified immunity and interlocutory appeals that this Court has crafted in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Johnson v. Jones*, 515 U.S. 304 (1995); *Behrens v. Pelletier*, 516 U.S. 299 (1996); and overrule the summary judgment criteria that this Court crafted in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp v. Catrett*, 477 U.S. 317 (1986), there is no justifiable reason for this Court to grant Bishop a writ of certiorari to the Court of Appeals to the Fifth Circuit.

Bishop's summary judgment application for entitlement to qualified immunity was denied by the District Court because Bishop did not bottom his summary judgment claim to immunity on uncontested facts. The Court of Appeals agreed with the District Court and said that because conflicts exist between the Respondent's (Plaintiff's) and Petitioner's

(Defendant's) versions as to what occurred, neither court was in a position to determine Bishop's motion for summary judgment.

Bishop unlawfully wishes this Court to reconsider his summary judgment application for immunity on a disputed record. The only permissible and lawful way this court could consider Bishop's claim to immunity would be if he was able to present this Court with an undisputed record. Although it is not entirely clear what the factual basis for Bishop's claim to immunity is, it appears that Bishop believes that *Saucier v. Katz*, 533 U.S. 194 (2001) stands for the proposition if a police officer orders a citizen carrying a protest sign to "keep a distance" from two political dignitaries at a public political event and the citizen refuses, then the officer is privileged to forcibly arrest that citizen thusly entitling the officer to immunity from suit. There are several obstacles and problems with Bishop's position. Hunter denies that he did not "keep a distance" and, further, Hunter insists that there was no evidence that he posed a threat to either dignitary on the occasion in question. Importantly, Hunter insists that he was subjected to arrest only after the political function had ended and the dignitaries that police officer Bishop was assigned to protect had left the event. Hunter insists that his arrest and the violations of the Fourth Amendment he has made against Bishop as a consequence of his arrest, resulted not from a refusal to "keep a distance", but because Bishop falsely contended that Hunter had assaulted him. Hunter contends that his insistence on displaying a protest sign at the event was a pretextual reason for his arrest. If true, this would violate the First Amendment. *New York Times Co. v. Sullivan*, 403 U.S. 713 (1971). Unlike *Saucier*, this event occurred in a public park and not in military reservation where rules related to protests might be difficult.

## CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

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